Supreme Court, U. S.
FILED
JAN 12 1974
MICHAEL RODAK, JR., CLERK

(E-4)

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated; ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated; JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK.
[AFTER REMAND, 409 U.S. 1052 (#72-582).]

STATEMENT AS TO JURISDICTION ON BEHALF OF APPELLANT LAVINE

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Appellant Lavine
The Capitol
Albany, New York 12224
Telephone: (518) 474-7178

RUTH KESSLER TOCH
Solicitor General

ALAN W. RUBENSTEIN
Principal Attorney

of Counsel

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-8457

TABLE OF CONTENTS.

	PAGE
Opinion Below After Remand	1
Jurisdiction	4
Statute Involved of the State of New York	6
Regulation Involved of the Secretary of Health, Education and Welfare	7
Statutes of the United States	8
Questions Involved	8
Statement of the Case	10
The Questions are Substantial	14
Conclusion	18
Appendix A—Memorandum-Decision and Order	19
Appendix B—Notice of Appeal to the Supreme Court of the United States	35
Appendix C—Statutes of the United States	38

TABLE OF CASES.

Burns v. *Doe* (No. 73-406) 7, 9, 17
Doe v. *Burns* (No. 73-5650) 9
Doe v. *Swank*, 332 F.Supp. 61 (N.D. Ill. 1971) affirmed *sub nom. Weaver* v. *Doe*, 404 U.S. 987 (1971) 6, 14
Jefferson v. *Hackney*, 406 U.S. 535 (1972) 16
King v. *Smith*, 392 U.S. 309 (1968) 14
Lavine v. *Shirley*, 409 U.S. 1052 (No. 72-582) 2, 5
Lewis v. *Lavine* (Dkt No. 72-CV-4249 [S.D.N.Y.]) 4
Meyers v. *Juras*, 327 F.Supp. 759 (D.Or., 1971) affirmed 404 U.S. 803 (1971), reh. den. 404 U.S. 961 ..... 6, 14
New York State Department of Social Services v. *Dublino*, ____ U.S. ____ (1973) 37 L. Ed. 2d 688 16
Taylor v. *Martin*, 330 F.Supp. 85 (U.S.D.C., N.D. Calif. 1971), affirmed *sub nom. Carleson* v. *Taylor*, 404 U.S. 980 (1971) 6, 14
Wyman v. *James*, 400 U.S. 309 (1971) 15, 16

STATUTES OF THE UNITED STATES.

PAGE

28 U.S.C. § 1253 5
28 U.S.C. § 1331 13
28 U.S.C. § 1343 ..... 4, 13
28 U.S.C. § 2201 4
28 U.S.C. § 2281 4
28 U.S.C. § 2284 4
42 U.S.C. § 602(a)(7) 8, 15, 17
42 U.S.C. § 602(a)(11)—(Appendix C) 8
42 U.S.C. § 602(a)(17) 8, 16
42 U.S.C. § 602(a)(18)(21)(22)—(Appendix C) 8

REGULATION OF THE SECRETARY OF HEALTH, EDUCATION AND WELFARE.

45 C.F.R. § 233.90(b)(4)(i)(ii) 3, 7, 17

CONSTITUTION OF THE UNITED STATES.

Fourteenth Amendment 5

RULES OF THE SUPREME COURT OF THE UNITED STATES.

Rule 13(2) 1
Rule 15 1

STATUTES OF THE STATE OF NEW YORK

New York Social Services Law § 101-a(2)(3) as added by Ch. 687 of the Laws of 1972 ..... 3, 6, 8, 9, 10, 11, 13, 14, 15, 16, 17
New York Family Court Act § 413 17
New York Family Court Act § 414 17
New York Family Court Act § 513 17

REGULATION OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES.

18 NYCRR § 369.2(f)(3)(ii)(e) 10, 15

IN THE

Supreme Court of the United States

October Term, 1973

No. .....

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,
Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated; ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated; JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,
Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.
[AFTER REMAND, 409 U.S. 1052 (#72-582).]

STATEMENT AS TO JURISDICTION ON BEHALF OF APPELLANT LAVINE

The appellant, pursuant to Rules 13(2) and 15 of the Rules of the Supreme Court of the United States files this statement of the basis upon which it is contended that the Supreme Court of the United States had jurisdiction on

direct appeal to review the final judgment in question, and should exercise such jurisdiction in this case.

The case at bar was before this Court before (*Lavine* v. *Shirley*, 409 U.S. 1052 [No. 72-582]).

On December 11, 1972, this Court issued its order that:

> "The judgment is vacated and the case remanded to the United States District Court for the Northern District of New York for further consideration in light of Chapter 687 of the 1972 Laws of New York (New York Social Services Law § 101-a as amended). *Differderfer* v. *Central Baptist Church*, 404 U.S. 412 (1971)."

Opinion Below After Remand
(Not yet reported)

The three-judge District Court on September 23, 1973 rendered its "Memorandum-Decision and Order" which was filed September 26, 1973. The "Memorandum-Decision" was amended by order of October 4, 1973. The "Memorandum-Decision", as amended, is set out as Appendix "A" to this jurisdictional statement.

The opinion below noted that the amended complaint does not reallege facts concerning the original named plaintiffs and that such omission was "by design since they no longer feel themselves aggrieved due to intervening events." The Court below found that, in its present posture, the case "• • • is an action by Anna Stuck on behalf of herself, her minor children and all others similarly situated, seeking declaratory and injunctive relief from enforcement against them of section 101-a of the New York Social Services Law because of their failure to cooperate in support of proceedings • • •."

The Court below was of the opinion that the plaintiffs "raised a substantial question with respect to the constitutionality of New York Social Services Law § 101-a as amended" but the Court disposed of the case on the "statutory claim rather than indulge in a constitutional ruling."

The Court below stated that "* * * while we are not outraged by nor unsympathetic to New York's effort to compel Anna Stuck to cooperate in a proceeding to compel support for her youngest child to the extent required by § 101-a, we find no authority for engrafting such a condition on to the Congressionally prescribed initial AFDC eligibility requirements or on to the grounds for discontinuance of benefits".

The Court below discussed 45 C.F.R. § 233.90(b) (4) (i) (ii)[1] and indicated that it had withheld decision until after the effective date of that regulation in order "to authoritatively consider its effect." The Court found that the "agency's new interpretation is in error and not a guidepost to be followed judicially."

Class action status was denied because of the pendency of *Lewis* v. *Lavine* (Dkt No. 72-CV-4249 (S.D.N.Y.)) a case also involving Social Services Law § 101-a in which a class action order had been made.

Finally, the Court below denied plaintiff's demand for retroactive payment.

The Order itself is discussed under *"Jurisdiction" infra.*

---

[1] A regulation of the Secretary of Health, Education and Welfare providing that a State is not required to make provision in its AFDC program for the maintenance of a parent or caretaker who fails to assist (1) in the establishment of paternity or (2) in seeking support from a person having a legal duty to support the child. (Published May 3, 1973 to be effective July 2, 1973 and set out in full *infra.*)

Jurisdiction

After remand and on or about March 14, 1973 the plaintiffs moved to amend their complaint, and Anna Stuck, a mother who refused to cooperate in locating the putative father of her youngest child, moved for permission to intervene in the action. By its order dated April 9, 1973 and entered April 18, 1973, the three-judge Court authorized plaintiffs to "amend their complaint so as to comply with the remand order of the Supreme Court by bringing the question of the validity of New York Social Services Law 101-a(2) (3) before this Court" and further ordered that "Anna Stuck may intervene as a plaintiff in the action" Jurisdiction was alleged in the amended complaint "to be conferred • • • by *42* (*Sic*) U.S.C. Section 1343(3) (4) • • • 28 U.S.C. Section 1331 • • • and 28 U.S.C. Section 2201 • • •."

The appeal herein is from the final order made in the United States District Court for the Northern District of New York by the three-judge panel (28 U.S.C. §§ 2281 and 2284) after remand by this Court. That order granted summary judgment in favor of plaintiff Anna Stuck against defendants below "declaring section 101-a, as amended, of the New York Social Services Law void, unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility for AFDC," and permanently enjoined the defendants "from denying or terminating AFDC assistance to plaintiff Anna Stuck or her minor children for failure to cooperate in obtaining support from an absent parent of her children."

The order further denied class action status and denied "plaintiff's demand for retroactive payment of the amounts wrongfully withheld from her."

The amended complaint sought declaratory and injunctive relief alleging that "[o]n its face and as applied by the Onondaga County Department of Social Services, the New York NOLEO[2] provision is invalid as establishing an additional eligibility requirement not provided for by the Social Security Act." The complaint further alleges "denial of the equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States."

Final judgment by the Court below granting relief as to plaintiff Anna Stuck only was dated September 23, 1973 and entered September 26, 1973 (Memorandum-Decision amended by order of October 4, 1973).

Notice of Appeal was filed on November 14, 1973 on behalf of the appellant Lavine, State Commissioner of Social Services, in the United States District Court for the Northern District of New York, a copy of which Notice is set out in the appendix herein as Appendix "B".

In the Notice of Appeal filed on behalf of appellant Lavine no appeal has been taken from such part of the order of the three-judge Court as permanently enjoined defendants from denying or terminating AFDC assistance to the minor children of Anna Stuck as provided in the order.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment above cited pursuant to the terms of 28 U.S.C. § 1253.

Jurisdiction of the Supreme Court to review the judgment below on direct appeal in this case is sustained by the Court's prior order in *Lavine* v. *Shirley*, 409 U.S. 1052 (#72-582).

---

[2] Notice to Law Enforcement Officers.

The following decisions, it is submitted, further sustain the jurisdiction of the Supreme Court to review on direct appeal the judgment in this case: *Taylor* v. *Martin*, 330 F.Supp. 85 (U.S.D.C., N.D. Calif. 1971), affirmed *sub nom. Carleson* v. *Taylor*, 404 U.S. 980 (1971); *Meyers* v. *Juras*, 327 F.Supp. 759 (D.Or., 1971) affirmed 404 U.S. 803 (1971) reh. den. 404 U.S. 961, and *Doe* v. *Swank*, 332 F.Supp. 61 (N.D. Ill. 1971) affirmed *sub nom. Weaver* v. *Doe*, 404 U.S 987 (1971).

Statute Involved of the State of New York

New York Social Services Law, § 101-a(2) (3)[3]
(52A McKinney's Social Services Law,
Page 35, pocket part)

"§ 101-a Proceedings to compel support by persons in need thereof

• • •

"2. An applicant or recipient of public assistance who is the parent of a child or minor shall assist and cooperate with the social services official and appropriate authorities to obtain support or contributions to support for such child or spouse from the other parent or spouse by:

"(a) Furnishing the social services official with appropriate information including the location of the other parent or spouse.

"(b) Filing a petition and furnishing evidence in a proceeding for the establishment of the child's paternity and support under article five of the family court act.

"(c) Filing a petition and furnishing evidence in a proceeding to secure support for her child and herself under article four of the family court act.

---

[3] As added by Chapter 687 of the Laws of New York of 1972. Section 4 of Chapter 687 provides as follows:

"§ 4. The provisions of this act shall be ineffective to the extent that they are determined to be not in compliance with federal law regulations pertaining to public assistance and care."

"3. In the event an applicant or recipient of public assistance fails to institute a proceeding in accordance with the provisions of this section or other similar provisions of law, the social services official shall institute such proceeding under the appropriate provisions of the family court act and if such applicant or recipient willfully fails or refuses to furnish evidence necessary to support such petition, or furnish information relative to the location of the other parent, the social services official shall not provide or continue to provide assistance or care for the maintenance of such applicant or recipient so long as such applicant or recipient fails to assist or cooperate as required by the provisions of this section or other provisions of law."

Regulation Involved of the Secretary of Health, Education and Welfare[4]

45 C.F.R. § 233.90(b)(4)(i)(ii)

"§ 233.90 Factors specific to AFDC.

• • •

"(b) *Condition for plan approval.*—

• • •

"(4) A child may not be denied AFDC either initially or subsequently because a parent or caretaker relative fails to assist;

"(i) In the establishment of paternity of a child born out of wedlock; or

"(ii) In seeking support from a person having a legal duty to support the child; But neither this nor any other provision of these regulations should be

---

[4] The three-judge Court discussed the regulation and concluded:

"Moreover, the unbroken line of court decisions construing these provisions and the absence of any Congressional corrective action persuade us that the agency's new interpretation is in error and not a guidepost to be followed judicially."

The Court below did not solicit the views of the Secretary of Health, Education and Welfare concerning the new regulation. This Court, however, has now apparently done so in *Burns* v. *Doe* (No. 73-406). (See "Question Involved", *infra*.)

construed to require that provision be made by a State in its AFDC program for the maintenance of a parent or caretaker who fails to provide such assistance and AFDC may be denied with respect to such parent or caretaker.

* * *"

(38 Federal Register 10940, May 3, 1973, to be effective July 2, 1973.)

Statutes of the United States

42 U.S.C. § 602(a)(7), (11), (17), (18), (21) and (22) is set out as Appendix C.

Questions Involved

Do the provisions of New York Social Services Law, § 101-a(2)(3) that a social services official shall not provide assistance or care for the maintenance of a parent, who is an applicant for or recipient of public assistance, who willfully fails or refuses to furnish evidence to support a petition by a social services official, brought in the Family Court of the State of New York under appropriate provisions of the Family Court Act, to establish a child's paternity and support or to secure support for such applicant's or recipient's child and herself or to furnish appropriate information including the location of the other parent, so long as such parent fails to assist or cooperate as required by such section or other provisions of law, conflict with the provisions of the Social Security Act? Does a regulation of the Secretary of Health, Education and Welfare authorizing denial of maintenance to a parent who fails to provide such assistance conflict with the provisions of the Social Security Act?[5]

---

[5] Before remand, the case was concerned only with an alleged requirement that parents or relatives institute or prosecute *non-support actions* against abandoning or deserting parents. After remand the only claim

(Footnote continued on following page)

Although this Court has considered cases in which a *child and a parent* have been denied assistance for the failure of the parent to cooperate with social services officials, it appears that the precise question here presented has not been passed upon by this Court.

The Court is, however, respectfully directed to a Petition for Certiorari filed on September 4, 1973 in the matter of *Burns* v. *Doe* (No. 73-406) which, *inter alia*, states the following question:

> "I. Whether a state can grant an ADC (AFDC) grant which includes only the needs of a minor child when the mother refuses to assist the State in its efforts 'to establish the paternity of such child and secure support for him' pursuant to Title 42 U.S.C. § 602(a)(17)(A)(i);"

On December 11, 1973, the Court invited the Solicitor General to file a brief in *Burns* v. *Doe* and in *Doe* v. *Burns*, (No. 73-5650—Cross Petition) expressing the views of the United States which, presumably, will extend, *inter alia*, to the view of the United States concerning the quoted question from *Burns* v. *Doe* (No. 73-406).

(Footnote continued from preceding page)
considered was that of Anna Stuck who refused to cooperate in connection with a proceeding to determine *the paternity* of her youngest child. The order of the Court below, however, declares New York Social Services Law § 101-a as amended "void, unenforceable and without effect insofar as it makes recipient cooperation in a *paternity or support* action against an absent parent a condition of eligibility for AFDC." (emphasis supplied). The "Question" has been framed in response to that declaration.

Statement of the Case

The plaintiffs in the original complaint (appellees on the first appeal prior to remand) were persons against whom it was claimed that New York Social Services Regulation 18 NYCRR § 369.2(f)(3)(ii)(e) had been applied. The final order in the case dated July 14, 1972 (before remand) had found that such regulation "violates the Social Security Act and regulations promulgated thereunder to the extent that it requires parents or relatives of needy and dependent children to institute and prosecute non-support actions against abandoning or deserting parents or spouses as a condition of eligibility for AFDC," and that order also permanently enjoined defendants from "terminating or denying AFDC to members of the plaintiff class because of their failure or refusal to institute or prosecute actions for non-support."

After this Court's remand, the attorney for plaintiffs moved as heretofore indicated for permission to serve an amended complaint and to intervene Anna Stuck. When that motion came on to be heard before United States District Court Judge, PORT, appellant moved to dismiss the action for lack of subject matter jurisdiction on the ground that the case had become moot by reason of plaintiffs' failure to comply with the remand of this Court.[6] Judge PORT ordered the motion to dismiss to be held for action by the three-judge Court.

The Amended Complaint

The amended complaint (permitted by the Court's order of April 9, 1973) made no statement of claim on behalf of the plaintiffs in the original action. The Court in its Memorandum-Decision of September 23, 1973 noted that:

---

[6] The original plaintiffs had failed to amend or supplement their complaint to show that section 101-a(2) (3) was being applied as against them. The County officers filed a similar motion.

> "The amended complaint does not reallege the facts concerning the original named plaintiffs. This omission was by design since they no longer feel themselves aggrieved due to intervening events. In its present posture, then, this is an action by Anna Stuck on behalf of herself, her minor children, and all others similarly situated * * *."

The amended complaint contains the following "Statement of Claim" on behalf of the intervening plaintiff, Anna Stuck:

> "Intervening Plaintiff Anna Stuck has been receiving public assistance for herself and her four infant children since 1970. She was required by the Onondaga County Department of Social Services to appear at their offices for the biannual recertification of her eligibility for public assistance. She did so on February 2, 1973. She was told that she must bring a paternity action against the father of her youngest child herself, or authorize the Department to do so, and that she must cooperate fully with the Department in such an action. She refused to cooperate in the bringing of such an action; her refusal was based on the fact that the father of her youngest child is disabled and is not able to support the child. Furthermore, she had been required by the Department of Social Services to file a paternity suit against the father of her first three children. That filing had lead to constant strife between her and the respondent. She does not wish to duplicate that situation with the father of her youngest child."

The amended complaint alleges two causes of action. The first cause of action alleges that New York Social Services Law § 101-a(2)(3) "establishes an additional eligibility requirement not provided for by the Social Security Act." Constitutional allegations are set forth in the second cause of action as follows:

> "Defendants' action in erecting an additional requirement of eligibility constitutes a denial of equal protection guaranteed by the Fourteenth Amendment

to the Constitution of the United States, in that it creates an invidious and unjustifiable distinction. New York's action in this case requires that impoverished mothers institute and cooperate in proceedings against their children's fathers; no such requirement is imposed on the well-to-do. Marriages of the well-to-do are not driven asunder by forcing one spouse to prosecute another. Classifications based on wealth have long been recognized as peculiarly obnoxious to the principles of equality enshrined in the Fourteenth Amendment."[7]

Answer of Appellant Lavine

The State Commissioner of Social Services (appellant here) filed his answer to the amended complaint "without prejudice to his opposition to the Court's order of April 9, 1973." As appears from such answer, the appellee Anna Stuck had a departmental fair hearing on March 1, 1973. Returned with the answer was the fair hearing decision of March 7, 1973. That fair hearing decision stated in part:

> "Appellant refused to disclose the location of the putative father of her youngest child. Appellant conceded at the fair hearing that she knew the mailing address of the putative father and had declined and still refused to disclose it. She had told the agency his name and the community where he presumably resided.
>
> "The record establishes that appellant had declared that she would not initiate paternity proceedings and desired that the agency not do so. Based upon the degree of cooperation received from appellant as to other information about the putative father, the agency properly found appellant's lack of cooperation to be a basis for termination of her assistance."

---

[7] We submit that appellees' constitutional allegations are without merit on their face. The finding of substantiality by the Court below is unexplained and may have been influenced by the many NOLEO decisions rather than by the sufficiency of the amended complaint itself. "Substantiality" we leave for plenary discussion if probable jurisdiction is noted by the Court.

The answer, *inter alia*, denied the allegations set forth in plaintiffs' first and second causes of action.

Separate affirmative defenses of failure to state a claim upon which relief could be granted were alleged as to the original plaintiffs and as to plaintiff Stuck. As has been noted, appellant Lavine's motion to dismiss the action on the grounds that the case had become moot was held by Judge Port for the three-judge Court. The answer sets out such grounds as an affirmative defense, and additionally, sets out the affirmative defense of lack of subject matter jurisdiction under 28 U.S.C. § 1343 and under 28 U.S.C. § 1331 (These additional grounds were also contained in a motion to dismiss served coincidentally with appellant's answer and returnable before the three-judge Court on the argument on May 11, 1973 and are set out below[*]). Further affirmative defenses were lack of jurisdiction to award damages as prayed for in the amended complaint against defendant Lavine (appellant here); lack of standing and lack of capacity to sue; lack of an actual case of controversy, lack of a justiciable controversy; that plaintiffs Shirley, Anderson and Doe had failed to exhaust administrative remedies and that all plaintiffs had failed to exhaust State judicial remedies; and finally, that New York Social Services Law § 101-a(2)(3) is valid and constitutional.

The court below considered the motions to dismiss as motions for summary judgment and granted summary judgment in favor of the plaintiff Anna Stuck only.

---

[*] "(a) The Court lacks jurisdiction under 28 U.S.C. § 1343 in that the amended complaint fails to present a substantial constitutional question, and by reason thereof, this Court lacks jurisdiction to determine any pendent statutory question."

"(b) The Court lacks jurisdiction under 28 U.S.C. § 1331 in that plaintiffs have not satisfied the requirements thereof."

The Questions are Substantial

I

The volume of litigation generated by state activity in the area of enlisting parental cooperation in obtaining support payments from absent fathers shows that the question presented is substantial. Substantiality is further demonstrated by the drain upon finite state resources caused by the failure of an abandoning or deserting parent to contribute toward the support of a dependent child.

This court has summarily affirmed three District Court decisions in this area. These are *Taylor* v. *Martin*, 330 F.Supp. 85 (U.S.D.C., N.D. Calif. 1971), affd. *sub nom. Carleson* v. *Taylor*, 404 U.S. 980 (1971); *Meyers* v. *Juras*, 327 F.Supp. 759 (D.Or., 1971) affd. 404 U.S. 803 (1971), reh. den. 404 U.S. 961 and *Doe* v. *Swank*, 332 F.Supp. 61 (N.D. Ill., 1971) affd. *sub nom. Weaver* v. *Doe*, 404 U.S. 987 (1971). In each of the cited cases, attempts had been made to deny AFDC benefits not only to uncooperative mothers, but to their children as well. The Court's summary affirmances appear to have been grounded upon the holding of *King* v. *Smith*, 392 U. S. 309 (1968) that the appeal in that case raised "• • • only the question whether the State may deal with • • • problems • • • *by flatly denying* AFDC assistance to otherwise eligible dependent children." (P. 320.) (Emphasis supplied.)

The case at bar, however, is different from the cited cases in that New York does not remove otherwise eligible children from AFDC assistance for the failure of their mother to cooperate in locating and obtaining support from a deserting or abandoning parent.

On the contrary, under the provisions of New York Social Services Law § 101-a(2)(3), it is only the mother

who stands to lose benefits for her refusal to cooperate. And under State Social Services Departmental Regulation 18 NYCRR § 369.2(f)(3)(ii)(e) which was before this Court on the first appeal in this case, only the mother stood to lose benefits.

Involved here is the fundamental question of whether the mother can refuse to cooperate with social services officials in locating and obtaining support from deserting or abandoning parents.[9]

The case at bar, no less than *Wyman* v. *James*, 400 U.S. 309 (1971) presents the question of whether a mother may obtain AFDC "*upon her own informational terms*" (p. 321) by her failure to cooperate in locating and obtaining support from a deserting or abandoning parent.

In *Wyman* v. *James, supra*, this Court recognized that AFDC could be denied to a family unit for failure of the mother to permit a home visit by a social worker thereby furnishing square precedent for reversal of the decision below in the case at bar in which only the mother is denied AFDC benefits (the children's benefits continue) for her failure to cooperate in locating and obtaining support from the father of her children.

And *Wyman* v. *James* can no longer be distinguished on the theory that it was decided upon only constitutional

---

[9] Compare 42 U.S.C. § 602(a) (7) that a State plan must "• • • provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;" New York Social Services Law § 101-a(2) (3) does not establish an additional condition of eligibility but provides the only practical means of determining whether or not an individual is entitled to AFDC in the first place.

grounds, the statutory argument receiving no consideration. This is so because this Court in *New York State Department of Social Services* v. *Dublino*, ____ U.S. ____ (1973) 37 L. Ed. 2d 688, expressly cited *Wyman* v. *James* as an example of regulation "promulgated within the legitimate sphere of state administration" (37 L. Ed. 2d 688, at 699).

II

The provisions of New York Social Services Law § 101-a (2)(3) "are not in violation of any specific provision of the Constitution or the Social Security Act." (*New York State Department of Social Services* v. *Dublino, supra*, ____ U.S. ____, (1973), 37 L. Ed. 2d 688, 700; *Jefferson* v. *Hackney*, 406 U.S. 535, 541 (1972).) Thus, it was error for the Court below to declare the statute "• • • void, unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility for AFDC".[10]

New York Social Services Law § 101-a "develops" and "implements" a State program under which the State of New York undertakes (a) to establish paternity of children born out of wedlock and to secure their support and (b) to secure support for deserted or abandoned children. New York's program is, we submit, in complete accord with 42 U.S.C. § 602(a)(17)(A)(i)(ii) and other provisions of the

[10] Even if it is assumed that New York Social Services Law § 101-a (2) (3) creates a condition of eligibility, such a condition would not conflict with the provisions of the Social Security Act. *Cf. New York State Department of Social Services* v. *Dublino, supra.* Since the lack of conflict between the State statute and the Social Security Act is thus apparent, we do not now brief legislative history. Our briefing in this regard in the Court below is to be found in "Brief of Defendant Lavine", "Reply Brief of Defendant Lavine" and a "Supplemental Memorandum" filed with the Court below and sent to this Court by the Clerk of the United States District Court for the Northern District of New York on November 28, 1973.

Social Security Act, including 42 U.S.C. § 602(a)(7) heretofore alluded to.

The primary responsibility for the support of the child is with its parents, not with the State. Under New York Family Court Act § 413, the father of a child is chargeable with its support if possessed of sufficient means or able to earn such means. Under the provisions of Family Court Act § 414, if the father of a minor is dead or incapable of supporting his child or cannot be found within the State, the mother of such child is chargeable with its support. And Family Court Act § 513, as to children born out of wedlock provides, *inter alia*, that "[e]ach parent of a child born out of wedlock is liable for the necessary support and education of the child and for the child's funeral expenses." New York Social Services Law § 101-a(2)(3) furthers the implementation of these basic concepts. Permitting a mother to receive public assistance while refusing to participate in obtaining support for herself and the dependent child is contrary to fundamental principles governing the duties of parents as regards their children.

Here involved is a fundamental State judgment that limited State welfare funds should be permanently expended only on behalf of those truly in need. Appellant's position is consistent with the provisions of the Social Security Act.

The Social Security Act should not be construed in such a manner as to free parents from the carrying out of such fundamental duties. The HEW regulation (45 C.F.R. § 233.90(b)(4)(i)(ii)) is recognition of such fundamental duties.[11]

---

[11] The HEW regulation is directly involved in the case at bar. The Iowa Court in *Burns* v. *Doe* (No. 73-406) did not consider the effect of the regulation upon its judgment because the regulation became effective only *after* judgment in the Iowa case was rendered.

III

The question here presented goes to the heart of the AFDC program and is, we submit, so substantial as to require plenary consideration, with briefs on the merits and oral argument.

CONCLUSION

Appellant respectfully prays that this Court note probable jurisdiction in this cause and place the case upon its calendar for argument.

Dated: January 2, 1974.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellant
Lavine

RUTH KESSLER TOCH
Solicitor General

ALAN W. RUBENSTEIN
Principal Attorney

of Counsel

APPENDIX A

Memorandum-Decision and Order

J. R. S.
U. S. District Court
N. D. of N. Y.
Filed
Sep 26 1973
At .... o'clock .... M.
J. R. Scully, Clerk
Albany

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

SYLVIA SHIRLEY, individually and on behalf of her minor children, TAMMY LYNN, and LISA MARIE, and on behalf of all others similarly situated, *et al*,

Plaintiffs,

vs.

ABE LAVINE, Commissioner of the Department of Social Services of the State of New York, *et ano.*,

Defendants.

72-CV-163

Appearances:

Onondaga Neighborhood Legal Services, 827 East Genesee Street, Syracuse, New York, Attorney for Plaintiffs.

Douglas A. Eldridge, Esq., Of Counsel.

Hon. Louis J. Lefkowitz, Attorney General of the State of New York, The Capitol, Albany, New York 12224. Attorney for Defendant Abe Lavine.

Ruth Kessler Toch, Solicitor General.

Alan W. Rubenstein, Principal Attorney Of Counsel.

John B. LaParo, Welfare Attorney, Onondaga County Department of Social Services, 600 South State Street, Syracuse, New York 13201, Attorney for Defendant Lascaris.

James H. Hughes, Esq., Assistant Welfare Attorney Of Counsel.

Before MANSFIELD, Circuit Judge, and FOLEY and PORT, District Judges.

EDMUND PORT, D. J.

The Supreme Court vacated a judgment of this Court[1] which declared 18 NYCCR § 369.2(f)(3)(ii)(e)[2] invalid as

---

[1] *Lavine* v. *Shirley*, 409 U.S. 1052 (1972).

[2] 18 NYCRR § 369.2(f)(3)(ii)(e) was the implementing regulation to Social Services Law § 101-a before the 1972 amendment, and provides as follows:

> (a) *Abandonment or desertion.* (*1*) All situations in which a parent is absent from the home and failing to comply with a court order for support or to fully support without court order, shall be classified as abandonment or desertion, and referred to the law enforcement officer in accordance with department regulations.
>
> (*2*) A parent or other relative applying for or in receipt of an ADC grant for a child who has been deserted or abandoned shall be informed that a report of the desertion or abandonment will be made to the law enforcement official within 30 days of such occurrence or of the initial granting of assistance.
>
> (*3*) A parent or other relative shall be required to furnish pertinent information in the location and prosecution of a deserting or abandoning parent.

(Footnote continued on following page)

establishing AFDC eligibility requirements in conflict with provisions of the Social Security Act, and remanded the case to this court for further consideration in light of Chapter 687 of the 1972 Laws of New York (New York Social Services Law § 101-a, as amended),[3] which had become effective subsequent to this court's decision.

(Footnote continued from preceding page)

(4) A parent or other relative who fails to cooperate with the social services official in the location and prosecution of the deserting or abandoning parent shall be ineligible for public assistance; and such failure to cooperate shall, in appropriate cases, be brought to the attention of the Family Court for whatever action the court may wish to take under such circumstances; such person's needs shall be excluded from consideration and the needs of the remaining family members shall be met in accordance with Part 352 of this Title; except that, if there is no other eligible relative in the home, such needs of the remaining family members shall be met as a protective payment in accordance with Part 381 of this Title.

(5) The agency shall fully utilize the services of the department's bureau of registry and location of deserting parents in its efforts to locate the missing parent.

[3] Section 101-a of the New York Social Services Law was amended by Chapter 687, Section 1, of the 1972 Laws of New York. Section 101-a, as amended, provides as follows:

§ 101-a. Proceedings to compel support by persons in need thereof

1. A recipient of public assistance or care or a person liable to become in need thereof may bring proceedings in a court of competent jurisdiction against any person responsible for his or her support as provided in section one hundred one of this chapter to compel any such person so responsible to provide for or contribute to such support.

2. An applicant or recipient of public assistance who is the parent of a child or minor shall assist and cooperate with the social services official and appropriate authorities to obtain support or contributions to support for such child or spouse from the other parent or spouse by:

(a) Furnishing the social services official with appropriate information including the location of the other parent or spouse.

(Footnote continued on following page)

In order to reactivate the matter in the district court after the remand, plaintiffs' attorney obtained an order requiring the defendants to show cause why the three judge court should not be reconvened to reconsider its decision in light of the amendment to § 101-a. Motions were also made for leave to file an amended complaint to squarely put the provisions of the amended section in issue, and for leave for Anna Stuck to intervene as plaintiff. The motions were granted.

Defendants have moved to dismiss the amended complaint. Affidavits and other matters outside the pleadings having been presented, those motions shall be treated as motions for summary judgment. Rule 12(b), F.R.C.P.

(Footnote continued from preceding page)

(b) Filing a petition and furnishing evidence in a proceeding for the establishment of the child's paternity and support under article five of the family court act.[1]

(c) Filing a petition and furnishing evidence in a proceeding to secure support for her child and herself under article four of the family court act.[1]

3. In the event an applicant or recipient of public assistance fails to institute a proceeding in accordance with the provisions of this section or other similar provisions of law, the social services official shall institute such proceeding under the appropriate provisions of the family court act and if such applicant or recipient willfully fails or refuses to furnish evidence necessary to support such petition, or furnish information relative to the location of the other parent, the social services official shall not provide or continue to provide assistance or care for the maintenance of such applicant or recipient so long as such applicant or recipient fails to assist or cooperate as required by the provisions of this section or other provisions of law.

As amended L. 1972, c. 687, § 1.

Prior to the amendment, § 101-a contained only the language now in subparagraph 1.

AMENDED COMPLAINT

The amended complaint does not reallege the facts concerning the original named plaintiffs. This omission was by design since they no longer feel themselves aggrieved due to intervening events. In its present posture, then, this is an action by Anna Stuck on behalf of herself, her minor children, and all others similarly situated, seeking declaratory and injunctive relief from enforcement against them of § 101-a of the New York Social Services Law because of their failure to cooperate in support proceedings as required by the section, and seeking as well the payment of benefits withheld on authority of the section.

We conclude that, while class action status and retroactive payment of benefits should be denied, the plaintiff is entitled to the declaratory and injunctive relief sought.

FACTS

The pertinent facts may be stated briefly. Plaintiff Intervenor has four children, aged 12, 9, 8 and 2. The family has received AFDC for some time. On January 17, 1973, she applied for recertification. This caused the agency to discover that there was no support order outstanding for the youngest illegitimate child. Plaintiff indicated that she did not desire that a paternity action be brought against the putative father.

She refused to cooperate in connection with such an action beyond stating the name of the putative father and the town where he lived, asserting he was unable to support the child because of physical disabilities. Her refusal was also based on unpleasantness in connection with similar proceedings brought against the father of her three other children.

After a fair hearing, the family's grant was reduced on the authority of § 101-a to reflect the exclusion therefrom of the plaintiff for her failure to cooperate. According to respective counsel, the reduction was between $75 and $100 per month. The Anna Stuck family, apart from § 101-a, is otherwise eligible for full assistance.

DISCUSSION

Plaintiffs, invoking our jurisdiction pursuant to 42 U.S.C. § 1343(3),(4) and 28 U.S.C. § 1331, have raised a substantial question with respect to the constitutionality of New York Social Services Law § 101-a, as amended, which warranted the convening of a three-judge court. *King* v. Smith, 392 U.S. 309, 312 n.3 (1968). However, in view of the fact that plaintiffs also raise an issue as to whether § 101-a violates the Supremacy Clause, which we believe to be dispositive of the case, our decision follows the Supreme Court's repeated direction that in such a case we should adjudicate the statutory claim rather than indulge in a constitutional ruling. See *Rosado* v. *Wyman*, 397 U.S. 397, 402 (1970); *Harmon* v. *Brucker*, 355 U.S. 579, 581 (1958).

Turning to the statutory claim, the Supreme Court's remand requires us to determine whether New York's amendment of § 101-a imposes conditions on eligibility for aid to dependent children which are not authorized by the Social Security Act and, more particularly, by the 1967 Amendments to that Act, commonly referred to as its NOLEO (Notice to Law Enforcement Officers) provisions.[4]

[4] 42 U.S.C. § 602(a)(17).

The latter require a state administering aid to dependent children to develop and implement, with respect to a child born out of wedlock who receives such aid and who has been deserted or abandoned, a program to establish the paternity of the child and to secure support from the deserting parent.

Two distinct goals of the Social Security Act's AFDC program are involved. Aid to Families with Dependent Children is premised on the fact that when a family is deserted by a parent who fails to fulfill his obligation of support, the family as such requires assistance. One of the goals of AFDC is to provide this assistance. An equally desirable goal is that the absent parent fulfill his legal obligation to support his child. A goal of the NOLEO provisions was to encourage and facilitate obtaining this support. While distinct, these goals are not necessarily conflicting. They become so only when one is pursued as the expense of the other.

While we are not outraged by nor unsympathetic to New York's effort to compel Anna Stuck to cooperate in a proceeding to compel support for her youngest child to the extent required by § 101-a, we find no authority for engrafting such a condition on to the Congressionally prescribed initial AFDC eligibility requirements or on to the grounds for discontinuance of benefits.

The authority is contrariwise. Every court that has considered the question of such conditions of eligibility has found itself compelled to invalidate them.[5] To argue, as

---

[5] *See, e. g., Doe* v. *Shapiro*, 302 F. Supp. 761 (D.Conn. 1969), app. dis., 396 U.S. 488 (1970); *Doe* v. *Swank*, 332 F. Supp. 61 (N.D.Ill.), aff'd *sub nom. Weaver* v. *Doe*, 404 U.S. 987 (1971); *Meyers* v. *Juras*,

(Footnote continued on following page)

the state does here, that it is only the noncooperating mother who is penalized and not the innocent child or children[6] is unrealistic. The distinction has been consistently rejected by the courts. Indeed the House Report (No. 1300) with respect to the 1950 amendment of 42 U.S.C. § 606(b) (70 Stat. 850) recognized the interdependency of provisions for and to the child and its caretaker-mother, stating:

(Footnote continued from preceding page)
327 F. Supp. 759 (D.Ore.), aff'd 404 U.S. 803 (1971); *Taylor* v. *Martin*, 330 F. Supp. 85 (N.D.Cal.), aff'd *sub nom. Carlson* v. *Taylor*, 404 U.S. 980 (1971); *Godfrey* v. *Stanton*, Civil No. 72 F 77 (C.D.Ind. decided June 8, 1973). The recent decision of a three-judge district court in *Doe* v. *Norton*, ____ F. Supp. ____ (D.Conn. Sept. 5, 1973), which upheld the constitutionality of a Connecticut statute obligating a mother to disclose her child's paternity and to prosecute a paternity suit against the putative father, is clearly distinguishable. There the statutory obligation, unlike that in the present case, did not impose an additional condition on eligibility for aid, payment of which continued regardless whether the mother complied with the Connecticut law. Indeed the parties here have recognized the possibility that various New York statutes may be interpreted to permit the New York Social Services Department to institute proceedings to compel a mother to cooperate in establishing paternity without conditioning aid on such cooperation. See Social Services Law §§ 102, 132a, 144; *In re Putman*, 208 N.Y.S.2d 896 (1970); NYCPLR §§ 3101, 3102, 3126; *Schwartz* v. *Schwartz*, 23 App. Div. 2d 204, 259 N.Y.S.2d 751 (App. Div. 1st Dept. 1965); *Green* v. *Brown*, 65 Misc.2d 226, 317 N.Y.S.2d 104 (Family Court, Westchester County, 1970); N.Y. Judiciary Law §§ 750, 753, 773, 774. In the event that existing statutes prove to be ineffectual or too cumbersome to achieve the objective, the way is open for the legislature to enact an appropriate law without conditioning continued aid upon such procedure.

[6] Three of the children making up the family unit here are not even offspring of the nonsupporting putative father.

[7] *Doe* v. *Harder*, 310 F. Supp. 302 (D.Conn.), app. dis., 399 U.S. 902 (1970); *Woods* v. *Miller*, 318 F. Supp. 510 (W.D.Pa. 1970); *Doe* v. *Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972); *Doe* v. *Gilman*, 347 F. Supp. 482 (N.D.Iowa), modified on other grounds, Dkt No. 72-1605 (8 Cir., decided June 6, 1973).

> "In the present law, aid to dependent children is defined as payments with respect to a dependent child. No specific provision is made for the need of the parent or other relative with whom the child is living. Particularly, in families with small children, it is necessary for the mother or another adult to be in the home full time to provide proper care and supervision. *Since the person caring for the child must have food, clothing, and other essentials, amounts allotted to the children must be used in part for this purpose if no other provision is made to meet her needs.*" (Emphasis supplied)

No one has questioned, nor do we here, that Congress has the power to condition eligibility for assistance upon new and additional requirements.[8] What the cases construing the NOLEO provisions make clear, however, is that in enacting them Congress did not utilize this power.

That the State lacks this power is equally well established:

> "[I]n the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause."[9]

---

[8] *See, New York Department of Social Services* v. *Dublino*, 41 U.S.L.W. 5047 (U. S. June 21, 1973).

[9] *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971).

EFFECT OF RECENT HEW REGULATION AMENDMENT

The defendants invoke a quite recent amendment to HEW regulations[10] as lending substantial support to the

---

[10] The change takes the form of an amendment to 45 C.F.R. § 233.90. The amendment and introductory commentary, as set forth in 38 Fed. Reg. 10940 (No. 85, May 3, 1973), are in their entirety as follows:

TITLE 45—PUBLIC WELFARE

CHAPTER II—SOCIAL AND REHABILITATION SERVICE (ASSISTANCE PROGRAMS), DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 233—COVERAGE AND CONDITIONS OF ELIGIBILITY IN FINANCIAL ASSISTANCE PROGRAMS

PATERNITY AND SUPPORT

Notice of proposed rulemaking for the program of Aid to Families With Dependent Children (AFDC) was published in the FEDERAL REGISTER on December 19, 1972 (37 FR 27637). The proposed regulations related to the U.S. Supreme Court summary affirmance of three cases dealing with refusal of caretaker relatives to cooperate in establishing paternity and securing support for the children.

The major recommendations regarding this proposal were that issuance be delayed until resolution of a related New York case, *Lavine* v. *Shirley*, recently remanded by the U.S. Supreme Court; that the uncooperative caretaker be excluded from the grant for the children; and that the regulations not be issued at all.

After consideration of all comments, the regulation is adopted with changes to make clear that AFDC may not be denied to the child, but may be denied to the uncooperative caretaker relative.

Section 233.90, part 233, chapter II, title 45 of the Code of Federal Regulations is amended by adding to paragraph (b) a new subparagraph (4) as set forth below:

§ 233.90 Factors specific to AFDC.

* * * * *

(b) *Condition for plan approval.*—(1) A child may not be denied AFDC either initially or subsequently "because of the conditions of the home in which the child resides", or because the home is considered "unsuitable", unless "provision is otherwise made pursuant to a State statute for adequate care and assistance with respect to such child". (Sec. 404(b) of the Social Security Act.)

(Footnote continued on following page)

validity of § 101-a, as amended. We have withheld our decision until after its effective date in order to authoritatively consider its effect.

The portion of the amendment permitting denial of assistance to parents or caretakers refusing to cooperate in obtaining support from absent parents was not in the amendment as originally proposed,[11] and was prompted, we

---

(Footnote continued from preceding page)

(2) • • •

(3) • • •

(4) A child may not be denied AFDC either initially or subsequently because a parent or caretaker relative fails to assist:

(i) In the establishment of paternity of a child born out of wedlock; or

(ii) In seeking support from a person having a legal duty to support the child;

But neither this nor any other provision of these regulations should be construed to require that provision be made by a State in its AFDC program for the maintenance of a parent or caretaker who fails to provide such assistance and AFDC may be denied with respect to such parent or caretaker.

• • • • •

(Sec. 1102, 49 Stat. 647 (U.S.C. 1302).)

Effective date.—These regulations in this section shall become effective July 2, 1973.

Dated April 19, 1973.

PHILIP J. RUTLEDGE,
Acting Administrator,
Social and Rehabilitation Service.

Approved April 30, 1973.

FRANK CARLUCCI,
Acting Secretary.

[FR Doc. 73-8843 Filed 5-2-73; 8:45 am]

[11] As originally proposed in 37 Fed. Reg. 27637 (No. 244, Dec. 19, 1972), the amendment to 45 C.F.R. 233.90 ended with the word "child." in (b)(4)(ii), and it was stated that the proposed amendment required, as a condition for approval of a state plan, that "[t]here may be no denial of assistance because a caretaker relative does not cooperate . . ."

are advised by defendant Lavine's counsel, by requests sent by Lavine and others to HEW. The amendment is a departure from the agency's past position.[12] It also runs counter to the consistent construction placed on the Social Security Act by the courts.[13]

In our view the amended regulation does little to support the validity of § 101-a.

> "[T]he principle that accords substantial weight to interpretation of a statute by the department entrusted with its administration is inapplicable insofar as those regulations are inconsistent with the requirement of § 402(a) (10) that aid be furnished 'to *all eligible* individuals.' "[14]

This point was reiterated in *New York Department of Social Services* v. *Dublino*,[15] which case supports rather than detracts from our decision here. In *Dublino*, the question before the Court was "whether that part of the Social Security Act known as the federal Work Incentive Program, pre-empts the provisions of the New York Social Welfare Law commonly referred to as the New York Work Rules."[16] The federal Work Incentive Program (WIN) and NOLEO were both parts of the 1967 AFDC amendments to the Social Security Act. A striking distinction

---

[12] *See., e. g.,* 45 C.F.R. 235.70(a), promulgated in February, 1971, and still in effect, wherein it is said of the NOLEO requirement of giving notice to law enforcement officials of the granting of AFDC to an abandoned child, that this "requirement has no effect upon the determination of eligibility. It is a requirement upon the agency . . ."

[13] *See*, cases cited note 7, *supra.*

[14] *Townsend* v. *Swank*, 404 U.S. 282, 286 (1971).

[15] 41 U.S.L.W. 5047 (U.S. June 21, 1973).

[16] 41 U.S.L.W. at 5047.

between the two is that with respect to WIN, Congress made participation a condition of eligibility,[17] while Congress has made no such provision in regard to NOLEO. The Court in *Dublino* specifically noted the law's requirement that "cooperation in WIN is necessary for employable individuals to continue to receive assistance."[18]

The Court's disposition in *Dublino* furnishes further support. While the Court resolved the pre-emption question against the plaintiffs, it nevertheless remanded the case for consideration of whether specific New York provisions were in conflict with specific Social Security Act provisions,[19] the very issue before this court.

As to the weight accorded HEW's interpretation of the Act in *Dublino*, a number of distinguishing factors should be noted. The Court stated that the agency "never" considered the WIN legislation to be pre-emptive, that it had "followed consistently" a policy of approving state work requirements, and that Congress presumably knew of this "settled" administrative policy.[20] Accordingly, the Court felt the agency's construction of the Act should be followed, in the absence of compelling indications that it is wrong.[21] As for the instant case, the department's new interpretation effective July 2, 1973 certainly may not be terms settled or consistent nor may it be said the agency was never

---

[17] *See*, 42 U.S.C. § 602(a)(19)(F), 1967 amendments. In 1971 amendments, Congress made it even clearer that "every individual, as a condition of eligibility for aid" must participate. 42 U.S.C. § 602(a)(19)(A).

[18] 41 U.S.L.W. 5049.

[19] 41 U.S.L.W. 5052.

[20] 41 U.S.L.W. at 5051-52.

[21] 41 U.S.L.W. at 5052.

of a contrary opinion. To the contrary, prior to July 2, the agency was never of the opinion that a non-cooperating AFDC recipient could be cut off from benefits; such "settled" and "consistently followed" agency interpretation as existed was that NOLEO provisions could *not* be transformed into conditions of eligibility.

Moreover, the unbroken line of court decisions construing these provisions and the absence of any Congressional corrective action persuade us that the agency's new interpretation is in error and not a guidepost to be followed judicially.

CLASS ACTION STATUS

Class action status should not be granted here due to other pending federal court actions in the State of New York. Intervening plaintiff Anna Stuck's assistance was terminated, after a fair hearing, for her failure to cooperate in obtaining support from the absent parent of her illegitimate child. All others "similarly situated" are embraced within other actions. *Doe* v. *Lavine*[22] concerns two named unwed plaintiffs in the same situation, and in *Lewis* v. *Lavine*[23] Judge Brieant granted a motion for class action status in a broader case involving § 101-a He defined the class as all those in the state denied assistance for failure to name the father of a child, or disclose his whereabouts, or cooperate in paternity or nonsupport proceedings, except those already maintaining actions in state or federal courts. No purpose would be served by creating an includ-

---

[22] *Doe* v. *Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972).

[23] *Lewis* v. *Lavine*, Dkt No. 72-CV-4249 (S.D.N.Y., decided March 6, 1973, order signed May 14, 1973).

ing or overlapping class. Accordingly, class action status in this suit is denied as unnecessary, and more importantly, to avoid the possibility of any individual being subject to multiple or conflicting decisions.

CONCLUSION

THE NOLEO provisions have been on the books for six years. During that period, courts have repeatedly and consistently construed their effect. If there is to be a change at this late date, it might better result from congressional action.

We are mindful of the Court's admonition that "[c]onflicts [between state and federal programs] to merit judicial rather than cooperative federal-state resolution, should be of substance and not merely trivial or insubstantial," and also that "if there is a conflict of substance as to eligibility provisions, the federal law of course must control."[24]

In light of the adjudicated cases dealing with similar state attempts to limit eligibility and the contrast between the federal agency's recent and past interpretation of the effect of failure to cooperate, the additional eligibility requirement created by § 101-a, being in conflict with requirements prescribed by Congress, is invalid and unenforceable.

ORDER

Accordingly, upon all the proceedings had herein, and the findings of fact and conclusions of law as contained in the decision herein, duly rendered, the court having jurisdiction of the parties and the subject matter, it is

---

[24] *New York Department of Social Services* v. *Dublino*, 41 U.S.L.W. 5047, 5052 n. 29 (U.S. June 21, 1973).

ORDERED, ADJUDGED and DECREED, that the defendants' motions to dismiss be and hereby are denied, and that summary judgment in favor of the plaintiff Anna Stuck against the defendants Lavine and Lascaris be and the same hereby is granted, declaring § 101-a, as amended, of the New York Social Services Law void, unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility for AFDC; and it is futher

ORDERED, that the defendants are permanently enjoined from denying or terminating AFDC assistance to plaintiff Anna Stuck or her minor children for failure to cooperate in obtaining support from an absent parent of her children; and it is further

ORDERED, that class action status is denied; and it is further

ORDERED, that plaintiff's demand for retroactive payment of the amounts wrongfully witheld from her is denied.[25]

WALTER R. MANSFIELD,
U.S.C.J.

JAMES T. FOLEY,
U.S.D.J.

EDMUND PORT,
U.S.D.J.

Dated: September 23, 1973.

---

[25] Despite the difference in equities between this case and *Rothstein* v. *Wyman*, 467 F.2d 226 (2 Cir. 1972), and the contrary view of other courts, *see*, *Jordan* v. *Weaver*, 472 F.2d 985 (7 Cir. 1973), cert. granted, *sub nom. Edelman* v. *Jordan*, 41 U.S.L.W. 3644 (U.S. June 12, 1973) and *Story* v. *Roberts*, 352 F. Supp. 473 (M.D. Fla. 1972), we feel constrained by this circuit's views regarding the Eleventh amendment as enunciated in Rothstein to deny the relief of judicially ordered retroactive payments. Our denial is without prejudice to any rights plaintiff may have to obtain such payment administratively.

APPENDIX B

Notice of Appeal to the Supreme Court of the United States

U. S. District Court
N. D. of N. Y.
Filed
Nov 14 1973
At .... o'clock ....M.
J. R. Scully, *Clerk*
Utica

UNITED STATES DISTRICT COURT

For the Northern District of New York

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similary situated; ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated, and JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Plaintiffs,

against

ABE LAVINE as Commissioner of the Department of Social Services of the State of New York; JOHN LASCARIS as Commissioner of the Department of Social Services of the County of Onondaga; individually and in their official capacities,

Defendants.

72-CV-163.

Notice is hereby given that defendant Abe Lavine, individually and as Commissioner of the Department of Social Services of the State of New York, hereby appeals to the Supreme Court of the United States from the final order

entered in this action on September 26, 1973, as amended on October 4, 1973, which (1) denied summary judgment to defendants and granted summary judgment in favor of the plaintiff Anna Stuck against defendants declaring section 101-a, as amended, of the New York Social Services Law void, unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility for AFDC, and (2) permanently enjoined defendants from denying or terminating AFDC assistance to plaintiff Anna Stuck for failure to cooperate in obtaining support from an absent parent of her children, and defendant Lavine appeals from each and every part of that order except that no appeal is taken from those parts of that order which (a) permanently enjoined defendants from denying or terminating AFDC assistance to the minor children of Anna Stuck as provided in that order; (b) denied "class action status"; and (c) denied "plaintiff's demand for retroactive payment of the amounts wrongfully withheld from her."

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: Albany, New York, November 13, 1973.

LOUIS J. LEFKOWITZ
Attorney General of the State of New York

By ALAN W. RUBENSTEIN
Principal Attorney
Attorneys for Defendant Lavine
Department of Law
The Capitol
Albany, New York 12224
Telephone: (518) 474-7178

Notice of Appeal to the Supreme Court of the United States

To:

Honorable J. R. Scully, Clerk
United States District Court for the
Northern District of New York
Federal Building
Utica, New York 13503

Douglas A. Eldridge, Esq.
Attorney for Plaintiffs
Onondaga Neighborhood Legal Services, Inc.
633 South Warren Street
Syracuse, New York 13202

Philip C. Pinsky, Esq.
Chief Welfare Attorney
Attorney for Defendant Lascaris
Onondaga County Department of Social Services
600 South State Street
Syracuse, New York 13202

John B. LaParo, Esq.
Welfare Attorney
Attorney for Defendant Lascaris
Onondaga County Department of Social Services
600 South State Street
Syracuse, New York 13202

APPENDIX C

Statutes of the United States

"42 U.S.C. § 602*

"(a) A State plan for aid and services to needy families with children must

• • •

"(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;

• • •

"(11) effective July 1, 1952, provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to families with dependent children in respect of a child who has been deserted or abandoned by a parent;

• • •

"(17) provide—

"(A) for the development and implementation of a program under which the State agency will undertake—

(i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, and

(ii) in the case of any child receiving such aid who has been deserted or abandoned by his parent, to secure support for such child from such parent (or from any other person legally liable for such support), utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support, and

---

* 1973 pocket part, page 106 *et seq.*

"(B) for the establishment of a single organizational unit in the State agency or local agency administering the State plan in each political subdivision which will be responsible for the administration of the program referred to in clause (A);

"(18) provide for entering into cooperative arrangements with appropriate courts and law enforcement officials (A) to assist the State agency in administering the program referred to in clause (17)(A), including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and (B) with respect to any other matters of common concern to such courts or officials and the State agency or local agency administering the State plan;

• • •

"(21) provide that the State agency will report to the Secretary, at such times (not less often than once each calendar quarter) and in such manner as the Secretary may prescribe—

"(A) the name, and social security account number, if known, of each parent of a dependent child or children with respect to whom aid is being provided under the State plan—

(i) against whom an order for the support and maintenance of such child or children has been issued by a court of competent jurisdiction but who is not making payments in compliance or partial compliance with such order, or against whom a petition for such an order has been filed in a court having jurisdiction to receive such petition, and

(ii) whom it has been unable to locate after requesting and utilizing information included in the files of the Department of Health, Education, and Welfare maintained pursuant to section 405 of this title,

"(B) the last known address of such parent and any information it has with respect to the date on

which such parent could last be located at such address, and

"(C) such other information as the Secretary may specify to assist in carrying out the provisions of section 610 of this title;

"(22) provide that the State agency will, in accordance with standards prescribed by the Secretary, cooperate with the State agency administering or supervising the administration of the plan of another State under this part—

"(A) in locating a parent residing in such State (whether or not permanently) against whom a petition has been filed in a court of competent jurisdiction of such other State for the support and maintenance of a child or children of such parent with respect to whom aid is being provided under the plan of such other State, and

"(B) in securing compliance or good faith partial compliance by a parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of a child or children of such parent with respect to whom aid is being provided under the plan of such other State;"

Supreme Court, U. S.
FILED
JUL 18 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

Nos. 73-1095, 73-1016

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

against

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellee.

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellant,

against

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Appellees,

and

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED DECEMBER 28, 1973 AND JANUARY 12, 1974, PROBABLE JURISDICTION NOTED JUNE 10, 1974.

APPENDIX

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-8457

INDEX TO APPENDIX.

	PAGE
Letter, dated February 5, 1974, from Michael Rodak, Jr., Clerk, by Miss Jennie H. Lazowski, Assistant, to Mr. James K. Evans, Chief Deputy Clerk, U. S. District Court, Northern District of New York	1
Docket Entries	2
Complaint	5
Order to Show Cause	19
Answer on Behalf of State Defendant	22
Answer on Behalf of County Defendant	30
Plaintiffs' Motion for Summary Judgment	34
Affidavit of Douglas A. Eldridge in Support of Plaintiffs' Motion for Summary Judgment	35
Affidavit of John Lascaris in Opposition to Plaintiffs' Motion for Summary Judgment	41
Order of Substitution	48
Transcript of Decision of Three Judge Court	49
Reporter's Certification	62
Order of Three Judge Court	63
Notice of Appeal of State Appellant	65
Notice of Appeal of County Appellant	67
Letter, dated December 11, 1972, from Michael Rodak, Jr., Clerk, by Mrs. Helen Taylor, Assistant Clerk, to Mrs. Ruth Kessler Toch, Solicitor General of New York, Dept. of Law—The Capitol	69
Order to Show Cause Dated March 14, 1973	71
Affidavit of Miss Anna Stuck in Support of Order to Show Cause	72

PAGE

Affidavit of Richard V. Hunt in Support of Order to Show Cause 74

Affidavit of James Bringley in Support of Order to Show Cause 75

Order Granting Leave to Amend Complaint and Permitting Intervention 76

Amended Complaint 78

Plaintiffs' Exhibit 1, Filed May 2, 1973 88

Hearing of March 1, 1973 88

Witness for Appellee:

Isaacs, Ruth

Direct Examination 92

Cross Examination 95

Witness for Appellant:

Stuck, Anna

Direct Examination 99

Cross Examination 100

Re-direct Examination 101

EXHIBITS.

(Not Printed.)

Agency's Exhibits:

Exhibit A—Application of Anna Stuck, dated January 17, 1973. Received in evidence at page 90.

Exhibit B—Recertification outline. Received in evidence at page 90.

Exhibit C—Notice of intent to reduce assistance, dated February 5, 1973. Received in evidence at page 91.

PAGE

Exhibits Received at Fair Hearing 105

Decision After Fair Hearing 105

Answer to Amended Complaint on Behalf of State Defendant 105

Documents Attached to Answer:

Administrative Letter No. 72 PWD-174, Dated November 6, 1972, From Deputy Commissioner Russo to Commissioners of Social Services 112

Decision After Fair Hearing, Dated March 7, 1973, in the Matter of the Appeal of Anna Stuck ... 117

Agency Summary *re:* Anna Stuck, Dated February 23, 1973 120

Recertification Outline 123

Notice of Intent to Reduce Public Assistance 127

Certification of Need for Public Assistance 128

Answer to Amended Complaint on Behalf of County Defendant 131

Memorandum-Decision and Order of the Court 136

Notice of Appeal of County Appellant 137

Notice of Appeal of State Appellant 140

Letter, dated June 10, 1974, from Michael Rodak, Jr., Clerk, by Mrs. Helen K. Loughran, Assistant Clerk, Mrs. Ruth Kessler Toch, Solicitor General of New York, Department of Law, The Capitol 144

Letter Dated February 5, 1974

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, D. C. 20543

COPY

February 5, 1974

Mr. James K. Evans
Chief Deputy Clerk
U. S. District Court
Northern District of New York
Utica, New York 13503

Re: Abe Lavine, etc. v.
Sylvia Shirley, etc., *et al.*,
No. 73-1016

(Your #72-CV-163)

Dear Sir:

I have your letter of January 31, 1974, in regard to the above-entitled case.

On the cover of the Order to Show Cause filed under date of March 20, 1973, there is endorsed "Order Authorizing Plaintiffs to Amend Complaint" filed April 17, 1973. The order itself appears at page 199.

Very truly yours,

MICHAEL RODAK, JR.,
Clerk,

By
(Miss) Jennie H. Lazowski,
Assistant.

cc:
Allan W. Rubenstein, Esq.
Principal Attorney

JHL:mhl

Docket Entries

NORTHERN DISTRICT OF NEW YORK

Civil No. 72-CV-163

	Page
Docket entries	A-D
Complaint, Filed 3/23/72	1
Summons, Filed 3/27/72	44
Affidavit of James Bringley, Filed 4/19/72	45
Affidavit of James Bringley, Filed 4/19/72	47
Copy of Notice of Proposed Case Closing, Filed 4/19/72	49
Designation of Judges, Filed 4/19/72	50
Notice of Hearing, Filed 4/19/72	51
Answer of Deft. Wyman, Filed 4/21/72	53
Answer of Deft. Lascaris, Filed 4/24/72	60
Order amending Notice of Hearing, Filed 5/5/72	64
Order to Show Cause, Filed 5/8/72	65
Affidavit of personal Service, Filed 5/11/72	86
Brief for Deft. Wyman, Filed 5/15/72	87
Memorandum of Law for Deft. Lascaris, Filed 5/16/72	101
Affidavit in Opposition, Filed 5/18/72	112
Answer, Filed 5/19/72	115
Answering Brief for Deft. Lavine, Filed 5/26/72	119
Notice of Motion, Filed 5/26/72	131

Docket Entries.

	Page
Order of Judge Port, Filed 5/26/72	139
Affidavit in Opposition to Pl. Motion, Filed 6/5/72	140
Transcript of Decision of Three Judge Court Filed 6/28/72	157
Order, Filed 7/21/72	176
Judgment, Filed 7/21/72	178
Notice of Appeal, Deft. Lavine, Filed 8/10/72	179
Notice of Appeal, Deft. Lascaris, Filed 8/18/72	181
Amicus Curiae Brief of State of Iowa in Sup. of Deft. Lavine, Filed 1/22/73	183
Decision from Supreme Court of U.S., Filed 1/24/73	183
Order to Show Cause, Filed 3/20/73	184
Motion to Dismiss, Filed 4/4/73	200
Memorandum of Law, Filed 4/9/73	202
Notice of Motion, Filed 4/9/73	213
Affidavit in Support of Motion to Dismiss Filed 4/9/73	215
Order for Pre-Trial Hearing, Filed 4/23/73	223
Notice of Hearing, Filed 4/23/73	225
Brief of Deft. Lavine, Filed 5/1/73	227
Answer to Amended Complaint, Filed 5/1/73	228
Motion to Dismiss, Filed 5/1/73	249
Pl. Exhibit 1, Filed 5/2/73	252

Docket Entries.

	Page
Answer to amended complaint, Filed 5/8/73	253
Affidavit of Lascaris, Filed 5/8/73	257
Reply brief of Deft. Lavine, Filed 5/10/73	269
Brief, Filed 5/21/73	270
Supplemental Memorandum, Filed 5/22/73	271
Memorandum of Law of Deft. Lascaris, Filed 5/24/73	272
Photocopy of Decision in 8th Cir., Filed 8/15/ 73	273
Memorandum-Decision and Order, Filed 9/26/73	278
Photocopy of Decision of 3 Judge Court in Dist. of Conn., Filed 9/28/73	296
Notice of Appeal, Lascaris, Filed 10/31/73	344
Misc. Letters to the Court, Filed 11/5/73	347
Notice of Appeal, Pl., Filed 11/12/73	356
Notice of Appeal, Lavine, Filed 11/14/73	359
Clerk's Certificate	362

Complaint

Copy

U. S. District Court
N. D. of N. Y.
Filed
Mar 23 1972
At ... o'clock ....M.
J. R. Scully, Clerk

IN THE

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Plaintiffs,

vs.

GEORGE K. WYMAN as Commissioner of the Department of Social Services of the State of New York,

and

JOHN LASCARIS as Commissioner of the Department of Social Services of the County of Onondaga; individually and in their official capacities,

Defendants

Index No. 72CV.163.

I

PRELIMINARY STATEMENT

This is a class action brought by plaintiff mothers of needy and dependent children on behalf of themselves, their minor children and all others similarly situated. Plaintiff mothers have been required by the Department of Social Services to file petitions of non-support in Family Court against the fathers of the named children as a condition of eligibility for public assistance in the Aid to Dependent Children category. Having filed such petitions plaintiff mothers are required to participate in proceedings in Family Court under the threat of loss of Aid to Dependent Children benefits.

The requirement of filing and prosecuting petitions of non-support as a condition of eligibility for Aid to Dependent Children has been held illegal as in conflict with the Social Security Act by the United States Supreme Court. Such a requirement violates Federal Regulations promulgated under the Social Security Act. Further, such a requirement violates the rights of plaintiffs and their minor children and all others similarly situated, which are secured by the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Termination of plaintiff Doe's daughter Kirsten and the threat of termination of the other named plaintiffs should they withdraw their petitions cause the plaintiffs to suffer grave harm to their health, safety and spirits. The harm is immediate and if the relief prayed for herein is not granted, will become irreparable.

II

NATURE OF ACTION

This is a class action brought by plaintiffs on behalf of themselves and as next friend of their children and on behalf of all others similarly situated for a Declaratory Judgment pursuant to Title 28 U.S.C. 2201, 2202, to declare that New York Department of Social Services Regulation 369.2(f)(3)(ii)(e) on its face and as interpreted and applied by the defendants has denied plaintiffs and others similarly situated public assistance in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, the Social Security Act (42 U.S.C. 601 *et seq.*), the regulations promulgated thereunder and Title 42 U.S.C. Sections 1983 and 1988 insofar as Social Services Regulation 369.2(f)(3)(ii)(e) on its face and as applied provides that a mother must file and prosecute a petition of non-support against the father of her children as a condition of her and her children's eligibility for public assistance.

III

JURISDICTION

Original jurisdiction is conferred upon this court by 42 U.S.C. Section 1343(3)(4) which authorizes federal courts to enforce rights, privileges and immunities derived from 42 U.S.C. Section 1983, the Fourteenth Amendment, 28 U.S.C. Section 1331 relating to actions arising under any federal statute, and 28 U.S.C. Section 2201 relating to Declaratory Judgments.

This action also seeks a temporary restraining order and a preliminary and permanent injunction to enjoin the defendants from denying public assistance to plaintiffs' needy and dependent children and all others similarly situated for their mothers' refusal to file and prosecute petitions of non-support on the ground that New York State Department of Social Services Regulation 369.2(f)(3)(ii)(e) violates the Fourteenth Amendment of the United States Constitution, and Title 42 of the U.S.C. Section 601-609, 1983 and 1988.

IV

THREE JUDGE COURT

Plaintiffs respectfully request that a three-judge district court be convened. Such a court is required under 28 U.S.C. Section 2281 because plaintiffs seek to enjoin the enforcement of New York State Department of Social Services Regulation 369.2(f)(3)(ii)(e) on the ground that the regulation contravenes the Fourteenth Amendment to the United States Constitution.

V

PLAINTIFFS

Plaintiffs are citizens of the United States and of the State of New York.

Plaintiff Sylvia Shirley lives in Syracuse, New York, with her two children, Tammy Lynn, age two years, and Lisa Marie, age eight months. The whereabouts of her husband is unknown. Plaintiffs have no income, resources or source of support other than their public assistance grant.

Plaintiff Elizabeth Anderson lives in Syracuse, New York with her daughter Joanne, age five years. She is separated from her husband who pays child support in the amount of $100.00 a month. For the balance of her and her daughter's needs plaintiff Anderson is forced to rely on Aid to Dependent Children benefits in the amount of $103.00 a month.

Plaintiff Jane Doe lives in Syracuse, New York with her three children, Robin, age fifteen, Paul, age twelve, and Kirsten Wynn, age one year. Plaintiff Doe is divorced from the father of Robin and Paul. Plaintiff Doe is the sole support of her three children. She receives no support payments from her former husband, nor does she receive support from Kirsten's father. Plaintiff Doe is employed part time on a varying schedule and has been forced to rely on Aid to Dependent Children to support her three children.

Plaintiffs are members of a class composed of New York resident families, otherwise eligible for benefits under the Aid to Dependent Children program administered by defendants, who have been required to file petitions of non-support against the fathers of their children as conditions of eligibility for public assistance by defendants acting pursuant to Social Services Regulation 369.2(f)(3)(ii)(e) of the State of New York.

VI

CLASS ACTION

This is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure in that persons in the class are so numerous that joinder of all members is im-

practical. There are questions of law or fact common to the class; the claims of the representative parties are typical of the claims of the class, and the representative parties will fairly and adequately protect the interests of the class.

VII

DEFENDANTS

Defendant George K. Wyman is Commissioner of the Department of Social Services of the State of New York, and Defendant John Lascaris is the Commissioner of the Department of Social Services of the County of Onondaga, in which capacities they are charged with administering the welfare laws and policy of said state, including Department of Social Services Regulation 369.2 (f)(3)(ii)(e).

VIII

STATEMENT OF CLAIM

Plaintiff Shirley has been separated from her husband since July 1971. She and her two infant children have been living variously with her mother and friends in Syracuse during this time with the exception of two weeks in September when she and her husband attempted to reconciliation. Because of the inability of her mother, who is on welfare, and her friends to continue to provide for her family, Mrs. Shirley applied for welfare in January 1972. She was denied on the grounds that she could work. Thereafter she reapplied.

This time she was denied because she refused to file a petition of non-support against her husband. By March 7, 1972 her situation was desperate and she again applied for welfare. She was again told by an intake worker for the

Department of Social Services that she would have to file a petition of non-support against her husband in order to be eligible.

Mrs. Shirley did not wish to file such a petition because she hopes that she and her husband will eventually be able to reconcile their differences. If she were to file such a petition any chance of reconciliation would be foreclosed since Mr. Shirley would hold her personally responsible for bringing the law to bear upon him and would file for divorce. Additionally Mrs. Shirley fears that such a filing would result in a child custody battle, since Mr. Shirley has told her that he would come back and take the children away from her should she prosecute him for non-support. Such an abrupt change of living habits would be extremely detrimental to the best interests of Mrs. Shirley's infant children who have already suffered extensive disruption of their young lives due to their parents' domestic difficulties.

However because of the brutal need of her children and herself, Mrs. Shirley was forced to comply with the requirement of the Department of Social Services and file a petition against her husband on March 8, 1972. At the time of filing, the Clerk of the Family Court was informed that Mrs. Shirley was filing the petition solely because the Department of Social Services required her to before they would grant her public assistance. (See Affidavit of David Contento, Appendix A.)

Plaintiff Shirley and her children are now receiving Aid to Dependent Children in the amount of $120.00 per month.

Plaintiff Anderson has been separated from her husband since September 1970. Her husband, who is a student living on a fellowship, has been supporting her and their child

in the amount of $100.00 a month. She applied to welfare on January 15, 1972. Notwithstanding the fact that she told the intake worker that her husband was paying support of $100.00 a month, she was required to file a petition of non-support against her husband. Mrs. Anderson did not wish to file such a petition because her husband was already supporting her to the full extent of his ability given the limited amount of his fellowship. On March 8, 1972, Mrs. Anderson, through her attorneys Onondaga Neighborhood Legal Services, Inc., informed the Family Court that she wished to withdraw her petition. To date she has not been informed by the Family Court whether such a withdrawal will be allowed. She has also informed the Department of Social Services or her withdrawal request. Because of previous statements by employees of the Department of Social Services, she is fearful that her grant and the grant to her child will be terminated because of her withdrawal request.

Plaintiff Doe and her children have received Aid to Dependent Children benefits since September 1971. Kirsten has been part of the assistance unit since October 1971, when her father ceased supporting her. On or about February 1, 1972, Mrs. Doe received a letter from the Onondaga County Department of Social Services informing her that Kirsten's assistance would not be paid until Mrs. Doe took Kirsten's father to Family Court and a support order was established. (A copy of the letter appears in Appendix B.) Kirsten's grant was terminated notwithstanding the fact that Mrs. Doe had filed non-support proceedings against Kirsten's father in the Fall of 1971 and that the matter had been placed on the held calendar by the Family Court in December, 1971.

Because the procedures for termination required by the Second Circuit's order in Almenares v. Wyman (December 8, 1971) were not followed in terminating Kirsten and because of the pendancy of a contempt motion against Commissioners Wyman and Lascaris for failure to follow the Second Circuit's order, Kirsten was restored to the assistance unit on February 22, 1972. However, a notice of termination of Kirsten was sent to Mrs. Doe that same day. A local hearing, as required by Almenares v. Wyman, was held February 29, 1972. The decision of that hearing upheld the termination of Kirsten and required Mrs. Doe to file another petition of non-support in Family Court if she wished to have her daughter reinstated. (See Appendix C, Notice of Decision Following Review dated 2/29/72.)

Because Mrs. Doe had filed a petition of non-support previously which had come to naught, and because the prospect of further dealings with Kirsten's father caused her severe emotional strain and distress, Mrs. Doe refused to refile in Family Court. Kirsten has received no Aid to Dependent Children benefits from March 1, 1972 to this date.

On March 1, 1972 Mrs. Doe's attorneys wrote to Leonard Koldin, Chief Welfare Attorney for the Onondaga County Department of Social Services, concerning Kirsten and the continued application of the NOLEO policy which had been declared illegal by the United States Supreme Court. Mr. Koldin refused to reinstate Kirsten. A copy of that letter and the Syracuse Herald-Journal article referred to therein are included as Appendix C.

IX

FIRST CAUSE OF ACTION

"A state eligibility standard that excludes persons eligible for assistance under federal Aid to Dependent Children standards violates the Social Security Act and is therefore invalid under the Supremacy Clause." Townsend v. Swank, United States Supreme Court decided December 20, 1971 (40 U.S.Law Week 4080).

The Social Security Act requires every state to seek contributions from persons legally responsible for the support of children receiving assistance. The requirement is known as NOLEO (Notice to Law Enforcement Officials). 42 U.S.C. Section 602(a) (11). The United States Department of Health, Education and Welfare has promulgated regulations which make it clear that NOLEO provisions are not to be used as conditions of eligibility:

a) The appropriate law enforcement officials will be notified in writing promptly as soon as Aid to Dependent Children has been furnished in respect to a child who is believed to have been deserted or abandoned by a parent. *This requirement has no effect upon the determination of eligibility.* It is a requirement upon the agency, and is fulfilled by providing the . . . information after a family has been found eligible and been granted assistance . . . (emphasis supplied) 45 C.F.R. Section 235.70.

New York's NOLEO requirement (1.18 N.Y.C.R.R. 369.2(f) (3) (ii) (e)) is being used by the Onondaga Department of Social Services to require an applicant for Aid to Dependent Children to file a petition of non-support against the father as a condition of eligibility for Aid to

Dependent Children for the mother and her children as well. The United States Supreme Court in affirming the decisions of three-judge courts in Oregon and California has determined similar NOLEO provisions to be invalid as setting up an additional requirement of eligibility not called for by the Social Security Act. Meyers v. Juras, United States Supreme Court (petition for rehearing denied, November 15, 1971) and Taylor v. Martin, United States Supreme Court (decided December 7, 1971). These affirmances make it clear that an applicant for public assistance may not be required to file a petition of non-support. Further, under these decisions an applicant cannot be compelled to cooperate in providing information about the absent parent as a condition of eligibility.

On its face and as applied by the Onondaga County Department of Social Services the New York NOLEO provision is invalid as establishing an additional eligibility requirement not provided for by the Social Security Act.

PLAINTIFFS' SECOND CAUSE OF ACTION

Defendants' action in erecting an additional requirement of eligibility constitutes a denial of equal protection guaranteed by the Fourteenth Amendment to the United States Constitution, in that it creates an invidious and unjustifiable distinction. New York's action in this case requires that impoverished mothers institute proceedings against their children's fathers; no such requirement is imposed on the well-to-do. Members of the plaintiffs' class have been required by the Onondaga County Department of Social Services to file petitions of non-support against their husbands where husband and wife are living at home in domestic harmony and have been forced to apply for welfare due

to the temporary unemployment of the husband. Marriages of the well-to-do are not driven asunder by forcing one spouse to prosecute another. Classifications based on wealth have long been recognized as peculiarly obnoxious to the principles of equality enshrined in the Fourteenth Amendment.

PLAINTIFFS' THIRD CAUSE OF ACTION

The New York practice offends principles of due process and equal protection because it establishes a classification based upon conditions which the affected individuals have no power to alter. The terminated plaintiffs include the one year-old child of Jane Doe, who has been denied the very means of subsistance for reasons which are wholly beyond her control; that is, her mother's refusal to reinstitute proceedings against her father.

Defendants' termination, or threat of termination unless plaintiffs prosecute, of their public assistance has caused them extreme hardship, suffering and anxiety, including inadequate food, clothing and shelter and the inability to pay debts. Plaintiffs have suffered severe and irreparable injury to their health, well-being and family life as a result of the NOLEO Regulation and will continue to suffer until such time as that regulation is declared unlawful.

In this action under 42 U.S.C. Section 1983, no exhaustion of state remedies is required: no adequate remedy at law is available to plaintiffs. Administrative Fair Hearings held by the State Department of Social Services provide no remedy because State Fair Hearing officers are not empowered to declare state regulations illegal.

X

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray on behalf of themselves and all others similarly situated that this Court:

1. Assume jurisdiction of this cause and convene a three-judge court pursuant to 28 U.S.C. Sections 2281 and 2284.

2. Issue a temporary restraining order and preliminary injunction pursuant to 28 U.S.C. Section 2284, ordering the defendants to reinstate the plaintiff Jane Doe's daughter Kirsten and all others similarly situated members of the plaintiff's class to assistance to which they are entitled, meeting the requirements for a reasonable subsistance compatible with decency and health, and require continued assistance to plaintiffs' class should any member withdraw a petition of non-support which she had previously filed.

3. Enter a final judgment pursuant to 28 U.S.C. Sections 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure declaring that the New York practices herein described in requiring plaintiffs to pursue non-support proceedings against the fathers of their children conflict with the Social Security Act of 1935, 42 U.S.C. Section 602, and the regulations promulgated thereunder by the Department of Health, Education and Welfare, and deny the plaintiffs and the class they represent due process and the equal protection of the laws guaranteed them by the Fourteenth Amendment to the United States Constitution.

4. Issue a permanent injunction restraining the defendants, their successors, agents and employees from terminating or denying public assistance to plaintiffs and the class they represent where such terminations or denials conflict with the Social Security Act of 1935, or deny equal protection of the laws in the manner described above.

5. Award the plaintiffs and the class they represent damages consisting of the public assistance to which they are entitled, but for the illegal and unconstitutional termination of benefits.

6. Award the plaintiffs their costs and disbursements incurred herein.

7. Award the plaintiffs reasonable attorney's fees.

8. Award the plaintiffs and all others similarly situated such further and alternative relief as may seem just and equitable.

Dated: March 21, 1972.

ONONDAGA NEIGHBORHOOD LEGAL SERVICES, INC.,

By: DOUGLAS A. ELDRIDGE, *of Counsel,*
Attorneys for the Plaintiffs,
633 South Warren Street,
Syracuse, New York 13202,
Telephone: (315)475-3127.

(Verification Omitted in Printing.)

Order to Show Cause

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing.)

Upon the verified Complaint and Affidavits of Sylvia Shirley, Elizabeth Anderson, and Jane Doe, it is

ORDERED that the defendants George K. Wyman and John Lascaris show cause in the Court Room of the United States Post Office, Clinton Square, Syracuse, New York, on the 10th day of April, 1972, at 10:00 A.M. or as soon thereafter as Counsel can be heard, why an Order should not issue or the Court take such other action as shall grant the plaintiffs herein the following relief:

1. An Order pursuant to Rule 23(c) (1) of the Federal Rules of Civil Procedure determining that this action may properly proceed as a class action pursuant to Rule 23(a) (b)(2) because: the class consisting of all mothers of needy and dependent children who would not be required to file petitions for non-support against the fathers of their children as a condition of eligibility for Aid to Dependent Children but for the operation of 18 N.Y.C.R.R. 369.2 (f) (3)(ii)(e), is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims of the representative parties are typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; and the parties opposing the class have acted on grounds generally applicable to the class, making appropriate final injunctive and declaratory relief with respect to the class as a whole;

2. The convening of a statutory court of three judges for the purpose of hearing and determining this application for a preliminary and permanent injunction and this cause, in accordance with the provision of Title 28, U.S.C. Sections 2281 and 2284, which require the convening of such a court when an interlocutory and permanent injunction are sought to restrain a state officer from the enforcement of a state-wide regulation that is alleged to conflict with the Constitution of the United States. The preliminary and permanent injunction are sought to restrain the defendants, who are state officers, their successors in office, agents and employees, and all other persons in active concert and participation with them, from refusing to grant the plaintiffs and all persons similarly situated Aid to Dependent Children benefits in the amount to which they are entitled on the ground they have refused to prosecute their childern's fathers for non-support.

3. A temporary restraining order pursuant to Title 28, U.S.C. Section 2284(3) restraining the defendants, their successors in office, agents and employees, and all other persons in active concert and participation with them, from refusing, pending the hearing and determination by a three-judge court convened pursuant to Title 28 U.S.C. Section 2281 and 2284, to grant the plaintiffs and all persons similarly situated Aid to Dependent Children on the ground that they refuse to prosecute their children's fathers for non-support. Plaintiffs seek this relief for themselves, their children, and all others similarly situated on the grounds that:

(a) Plaintiffs and all others similarly situated are each suffering, or are threatened with imminent suffering,

of irreparable damage in that they are without means to provide themselves with the basic necessities requisite for a minimum standard of decency and health and will continue to suffer even greater deprivation unless they are granted Aid to Dependent Childern without being required to prosecute non-support actions.

(b) The issuance of a Temporary Restraining Order will not cause undue inconvenience or loss to the defendants but will prevent irreparable damage to the plaintiffs and others similarly situated;

(c) The regulation that deprives plaintiffs and all others similarly situated of Aid to Dependent Children violates the Fourteenth Amendment of the Constitution of the United States, the Social Security Act of 1935, and regulations promulgated thereunder;

(d) Plaintiffs have no adequate remedy at law, as set forth more fully in the verified Complaint and the affidavits of the plaintiffs attached hereto.

IT IS ORDERED that service of this Order on defendants on or before 5 o'clock on the 27th day of March, 1972, be deemed sufficient. Any memoranda of law to be filed on or before April 3, 1972.

Done and ordered at the Federal Building, Auburn, New York, on this 23rd day of March, 1972, at .... o'clock in the ....noon.

s/ EDMUND PORT,
United States District Judge.

Answer on Behalf of State Defendant

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing.)

George K. Wyman, Commissioner of Social Services of the State of New York, by Louis J. Lefkowitz, Attorney General, Sidney L. Grossman, Assistant Attorney General in Charge, Syracuse, New York, of counsel, one of the defendants above named, answering the complaint herein, alleges as follows:

1. DENIES each and every allegation of plaintiffs' complaint designated numbers 'I', 'IV', 'VI', 'VII'.

2. ADMITS allegations of plaintiffs' complaint designated number 'II'.

3. DENIES information sufficient to form a belief as to allegations of plaintiffs' complaint designated numbers 'V', and 'VIII'.

4. As to allegation number 'III' of plaintiffs' complaint, the first paragraph is ADMITTED, the second paragraph is DENIED.

5. As to allegation number 'IX', the first paragraph is ADMITTED and all other paragraphs of said allegation numbered 'IX' are DENIED.

6. Defendant, George K. Wyman, as Commissioner of the Department of Social Services, further DENIES each and every allegation in the complaint, not herein admitted, controverted or specifically DENIED.

DEFENSES

FOR A FIRST, SEPARATE AND DISTINCT DEFENSE, DEFENDANT, GEORGE K. WYMAN, AS COMMISSIONER, ALLEGES THAT THE PLAINTIFFS' CLASS ACTION SHOULD NOT BE MAINTAINED AS THEY HAVE ADEQUATE ADMINISTRATIVE REMEDIES AVAILABLE TO THEM.

Public assistance to a welfare recipient may not be terminated until such person has been afforded the opportunity of a Fair Hearing. (*Almenares* v. *Wyman*, 453 F.2d 1075, 2nd Circ., decided 12/10/71.)

Where a welfare recipient is successful at a Fair Hearing, assistance would be continued; if not successful, his remedy would be the commencement of an Article 78 proceeding under New York Law.

FOR A SECOND, SEPARATE AND DISTINCT DEFENSE TO SAID COMPLAINT, DEFENDANT, GEORGE K. WYMAN, AS COMMISSIONER, ALLEGES:

Section 369.2 (f) (3) (ii) (e) of Title 18 N.Y.C.R.R. is consistent with the Social Security Act and therefore valid.

The primary purpose of the Aid to Families with Dependent Childern (hereinafter A.F.D.C.) program as implimented by the Social Security Act (Title 42 U.S.C. §§ 601-610), is to provide financial aid to needy and dependent children. *Doe* v. *Shapiro*, 302 F. Supp. 761 (D.C. Conn. 1969). To effectuate this program, the Social Secuity Act provides that each state is obligated to provide aid to families with dependent children with reasonable promptness. Title 42 U.S.C. § 602 (a) (10).

One of the problems that has arisen as a result of this program, is that many legally responsible parents have neglected their duty to provide for the support of their dependent children. In promulgating Section 369.2 (f) (3) (ii) (e) of Title 18 N.Y.C.R.R., defendant, Wyman intended to prohibit this practice from occurring. Section 369.2 (f) (3) (ii) (e) states the following:

> "(e). Abandonment or desertion. (1) All situations in which a parent is absent from the home and failing to comply with a court order for support, or to fully support without court order, shall be classified as abandonment or desertion, and referred to the law enforcement officer in accordance with department regulations.
>
> (2) A parent or other relative applying for or in receipt of an ADC grant for a child who has been deserted or abandoned shall be informed that a report of the desertion or abandonment will be made to the law enforcement official within 30 days of such occurrence or of the initial granting of assistance.
>
> (3) A parent or other relative shall be required to furnish pertinent information in the location and prosecution of a deserting or abandoning parent.
>
> (4) A parent or other relative who fails to cooperate with the social services official in the location and prosecution of the deserting or abandoning parent shall be ineligible for public assistance; and such failure to cooperate shall, in appropriate cases, be brought to the attention of the Family Court for whatever action the Court may wish to take under such circumstances; such persons' needs shall be excluded

from consideration and the needs of the remaining family members shall be met in accordance with Part 352 of this Title; except that, if there is no other eligible relative in the home, such needs of the remaining family members shall be met as a protective payment in accordance with Part 381 of this Title.

(5) The agency shall fully utilize the services of the department's bureau of registry and location of deserting parents in its efforts to locate the missing parent."

Under no circumstances does the above regulation terminate financial assistance to needy and dependent children. Only the parent or other relative who fails to cooperate with the Social Services official in the location and prosecution of the deserting or abandoning parent, shall be ineligible for public assistance. 18 N.Y.C.R.R., 369.2 (f) (3) (ii) (e) (4).

In the case of *Lascaris* v. *Wyman*, 67 Misc. 2d 17 (1971), New York State Supreme Court Justice John R. Tenney, in his opinion, stated the following:

"In considering the problem of collection from abandoning parents, it was the clear intention of Congress to give the States additional tools and to impose further obligations upon them to assure the determination of legal responsibility for support and to make efforts to make these collections. The committee believes it is essential to make certain that all legally responsible parents of sufficient means make their appropriate contribution to the support of their children." (S. Report No. 744, 90 Cong. and 1st Sess [1967], reprinted in U.S. Code Cong. and Admin. News 1st Sess. [1967], pp. 2834, 2997). *Ibid.* at 19.

In *Wyman* v. *James*, 400 U.S. 309, 91 S. Ct. 381 (1971), the United States Supreme Court considered the validity of a New York State statute requiring home visitation and the State Commissioner's regulations applying it to the A.F.D.C. program.

In that case, a mother who had applied for A. F. D. C. for herself and her children, refused to allow a case worker to make a home visit to her home. The State thereupon denied further A.F.D.C. benefits to the mother and her children. She then brought suit in Federal District Court to compel further assistance.

The Supreme Court upheld this action as not being inconsistent with the program (42 U.S.C.A. 601 *et seq.*), and not violative of any constitutional right. The Court said at page 318-319,

> "The agency, with tax funds provided from federal as well as from state sources, is fulfilling a public trust. The state, working through its qualified welfare agency, has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses. Surely it is not unreasonable . . . that the State have at its command a gentle means, of limited extent and of practical and considerate application, of achieving that assurance."

The cases of *Taylor* v. *Martin*, 330 F. Supp. 85 (N.D. Calif. 1971), U.S. Supreme Court (affirmed, December 7, 1971) and *Meyers* v. *Juras*, 327 F. Supp. 759 (D.C. Ore. 1971), U.S. Supreme Court (petition for rehearing denied, November 15, 1971) upon which plaintiffs rely heavily, may be easily distinguished from the instant matter.

In those cases, certain state regulations were declared invalid for the reason that they set up an additional requirement of eligibility for financial assistance. Both of these state regulations terminated A.F.D.C. benefits to the dependent children on the basis of a legally responsible parent's failure to cooperate. However, the New York regulation does not provide for termination of financial assistance to needy and dependent children at any time. Only the needs of the parent or other relative who fails to cooperate are excluded from consideration. 18 N.Y.C.R.R. 369.2 (f) (3) (ii) (e) (4).

THEREFORE, the paramount goal of the Social Security Act has not been violated by said regulation.

FOR A THIRD, SEPARATE AND DISTINCT DEFENSE TO SAID COMPLAINT, DEFENDANT, GEORGE K. WYMAN, AS COMMISSIONER, ALLEGES:

The Equal Protection Clause of the Fourteenth Amendment has not been violated by Section 369.2 (f) (3) (ii) (e).

There is a rational basis for the requirement that a parent or other relative be required to furnish information in the location and prosecution of a deserting or abandoning parent.

Again, the paramount goal of the A. F. D. C. program is to provide financial assistance to needy and dependent children. *Doe* v. *Shapiro, supra.* A parent who is capable of providing said support, should be required to do so. By requiring the furnishing of such pertinent information. the location and prosectuion of the parent shall be facilitated, and his obligation will be met. Therefore, the

burden of support will not rest solely upon the taxpayer.

Plaintiffs unrealistically contend that Regulation 369.2 (f) (3) (ii) (e) creates a classification based on wealth. However, the principles enunciated by the plaintiffs would, in fact, establish a special class of citizens.

New York State Supreme Court Justice Tenney, in *Lascaris* v. *Wayman, supra* at 22, held the following:

> "Public assistance is based upon the economic fact that all citizens need spending power and some may be cut off from acquiring it because of the exigencies of life. However, there is no need to create a special class of people with special rules. This is not only unfair to the society, it is also unfair to the recipient. He should accept responsibilities which are common to every other citizen in daily life. Requiring an applicant to answer pertinent questions to establish his need is no different than a questionnaire furnished to applicants for employment or other services."

Therefore, the regulation in question does not violate the Fourteenth Amendment, by discriminating against the parent or relative who is required to provide said information.

Furthermore, the constitutional rights of the children have not been violated for the reason that benefits to them do not cease under any circumstances other than need and dependency.

FOR A SEPARATE AND DISTINCT DEFENSE ARISING UPON THE FACE OF THE COMPLAINT HEREIN, DEFENDANT, GEORGE K. WYMAN, AS COMMISSIONER, ALLEGES:

That the facts set forth in said complaint are insufficient to state a claim upon which relief can be granted.

WHEREFORE, the defendant, George K. Wyman, as Commissioner, prays judgment and requests 1) that the New York practices set forth in the complaint requiring plaintiffs to pursue non-support proceedings against the fathers of their children be found not to be in conflict with the Social Security Act of 1935, 42 U.S.C. Section 602 and the regulations promulgated thereunder by the Department of Health, Education and Welfare, 2) that the complaint of the plaintiffs be dismissed on the merits, and for such other and further relief as to the Court may seem just and proper.

LOUIS J. LEFKOWITZ,
Attorney General,
Attorney for Defendant, Wyman,

By SIDNEY L. GROSSMAN,
Assistant Attorney General in Charge,
333 East Washington Street,
Syracuse, New York 13202.
Telephone: (315) 474-5951, Ext. 215.

(Verification omitted in printing.)

Answer on Behalf of County Defendant

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing.)

John L. Lascaris, Commissioner of the Department of Social Services, County of Onondaga, individually and in his official capacity, by his attorney, Leonard C. Koldin, in answer to the complaint herein:

1. ADMIT the allegations contained in Paragraph VII of the complaint herein.

2. DENY each and every allegation of Paragraphs I, II, III, VI and PLAINTIFF'S SECOND CAUSE OF ACTION of the complaint herein.

3. As to Paragraph IV, argument was had before Judge Edmund Port of the United States District Court for the Northern District of New York on April 10, 1972. As a result of the argument, Judge Edmund Port has ordered a three judge panel be convened.

4. As to paragraph V, ADMIT to the first sentence thereof, and to the Paragraph pertaining to Sylvia Shirley and her two children; but DENY each and every allegation in the Paragraph pertaining to Elizabeth Anderson and Jane Doe, and as to the last Paragraph, DENY the allegation that plaintiff is required to file petitions of non-support against the fathers in order that the children receive public assistance.

5. As to Paragraph VIII, the defendant does not have sufficient information available to frame an answer to the allegations contained therein.

6. As to the FIRST CAUSE OF ACTION, Paragraph IX, ADMIT that the Social Security Act requires every state to seek contributions; but DENY that 18 N.Y.C.R.R. 369.2 (f)(3)(ii)(e) is the NOLEO requirement, and that the aforesaid section is similar to the Oregon and California NOLEO provisions, and DENY that the aforesaid section on its face and as used by the defendant establishes an additional eligibility requirement.

7. As to the THIRD CAUSE OF ACTION, DENY each and every allegation and conclusion contained therein; and specifically DENY that no exhaustion of state remedies is required; since there is an adequate remedy at law available to the plaintiffs under New York State Law.

FOR A FIRST, SEPARATE AND DISTINCT DEFENSE TO THE COMPLAINT HEREIN, DEFENDANTS ALLEGE:

8. The complaint herein does not establish a cause of action, because none of the plaintiffs have standing to ask for the remedies requested in the complaint.

9. Sylvia Shirley, with her two children, Tammy Lynn, age two years, and Lisa Marie, age eight months, have been receiving full assistance allowable since the date Sylvia Shirley filed an application for assistance on March 8, 1972.

10. Elizabeth Anderson and her daughter, Joanne, age five years, have been receiving full assistance allowable since the date Elizabeth Anderson filed an application for assistance on January 18, 1972.

11. Jane Doe and her children have been receiving full assistance for a number of months. As to Kirsten, the department received information that she was receiving support from her father and consequently suspended assistance as to Kirsten only. Clearly then, the child Kirsten and the plaintiff, Jane Doe, do not qualify to be considered in the class of citizens for which this action was brought.

12. All plaintiffs including the child, Kirsten, are eligible for and have been receiving medical assistance and food stamps.

FOR A SECOND, SEPARATE AND DISTINCT DEFENSE TO THE COMPLAINT HEREIN, DEFENDANTS ALLEGE:

13. If the plaintiffs herein had been denied Aid to Dependent Children, said plaintiffs would have had available an adequate remedy at law which must be exhausted before said plaintiffs can raise the unconstitutionality of the statutes of the State of New York.

14. The Social Welfare Law of the State of New York provides an adequate remedy, by means of a Fair Hearing, to those individuals who feel they have been aggrieved by the County interpretation of a State statute. Section 139-a, Sub-section 7, "Special provisions to avoid abuse of assistance and care", provides:

> "If an application is not acted upon by the public welfare official within thirty days after the filing of the application or if the applicant is determined by the public welfare official to be undeserving of and ineligible for assistance, the applicant may appeal to the de-

partment, which upon receipt of the appeal shall review the case, shall give the applicant making the appeal an opportunity for a fair hearing thereon and within thirty days render its decision. All decisions of the department shall be binding upon the public welfare districts involved and shall be complied with by the public welfare officials thereof."

15. The plaintiffs in this action have not availed themselves of this administrative procedure, primarily because they are receiving full assistance and have not been aggrieved by the local interpretation of the Commissioner for the Department of Social Services, County of Onondaga.

WHEREFORE, defendant respectfully requests that this court enter a judgment dismissing the complaint herein.

Dated: April 12, 1972.

LEONARD C. KOLDIN, ESQ.,
Onondaga County Welfare Attorney,
Attorney for Defendant,
Onondaga County Department of Social Services and its Commissioner,
John L. Lascaris,
600 South State Street,
Syracuse, New York 13202.

JAMES H. HUGHES, *of Counsel.*

Plaintiffs' Motion for Summary Judgment

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing.)

Sirs:

PLEASE TAKE NOTICE that upon the annexed affidavit of Douglas A. Eldridge, Esq., plaintiffs' complaint and plaintiffs' memorandum of law and brief previously submitted and upon all the proceedings had herein, plaintiffs will move this Court on June 7, 1972 at 2:00 o'clock in the afternoon or as soon thereafter as counsel may be heard in the main courtroom, Federal Building, Syracuse, New York, for a summary judgment pursuant to Rule 56 declaring unconstitutional and in violation of the Social Security Act and regulations promulgated thereunder New York Social Services regulation 369.2 (3) (f) (ii) (e) and permanently enjoining the enforcement of said regulation and for a determination pursuant to Rule 23 that this action may be maintained as a class action, and for such other and further relief as the Court may deem just and proper.

Dated: Syracuse, New York, May 25, 1972.

Respectfully submitted,

ONONDAGA NEIGHBORHOOD LEGAL SERVICES,

DOUGLAS A. ELDRIDGE, *of counsel*,
Attorneys for Plaintiffs,
633 South Warren Street,
Syracuse, New York 13202,
Telephone: (315) 475-3127.

Affidavit in Support of Plaintiffs' Motion for Summary Judgment.

To:

Phillip Pinsky, Esq.,
Assistant Welfare Attorney,
Department of Law,
Onondaga County Department
of Social Services,
600 South State Street,
Syracuse, New York 13202.

Sidney Grossman, Esq.,
Assistant Attorney General,
State Office Building,
333 East Washington Street,
Syracuse, New York 13202.

Affidavit in Support of Plaintiffs' Motion for Summary Judgment

State of New York,
County of Onondaga, } ss.:
City of Syracuse.

I, DOUGLAS A. ELDRIDGE, being duly sworn, depose and say that:

1. I am an attorney at law admitted to practice in New York State and am a member of the bar of this Court. I am employed by Onondaga Neighborhood Legal Services, Inc., and as such am counsel for the plaintiffs herein.

2. I am fully familiar with all the facts of this case. I make this affidavit in support of plaintiffs' motion for summary judgment.

3. Plaintiffs' class consists of all applicants and recipients of public assistance in the State of New York who have been denied assistance or are threatened with denial for their refusal to file and prosecute petitions of non-support against responsible relatives pursuant to New York Social Services regulation 369.2(3)(e)(ii)(f).

4. Plaintiffs have moved for a summary judgment in the above captioned proceeding pursuant to Rule 56. Plaintiffs contend that as to the following material facts there is no genuine issue to be tried.

a. At the time of her application for public assistance in March, 1972, Sylvia Shirley was required by the Onondaga County Department of Social Services to file a petition of non-support against her husband as a condition of her and her two infant children's eligibility for Aid to Dependent Children.

b. An application made by Mrs. Shirley earlier in the year was denied because Mrs. Shirley refused to prosecute her husband.

c. Mrs. Shirley did not wish to file such a petition because she feared such an act would cause her husband to file for divorce and to attempt to remove the two infant children of the marriage from her custody.

d. Since Mrs. Shirley was destitute and had no way to obtain subsistence for herself and her infant children other than Aid to Dependent Children, she filed a petition of non-support against her husband.

e. Mrs. Shirley has undertaken steps to withdraw her non-support petition in Family Court.

f. Because of her attempted withdrawal, Mrs. Shirley fears that the Onondaga County Department of Social Services will proceed against her pursuant to Social Services regulation 369.2(f)(3)(ii)(e) and terminate her assistance.

g. Mrs. Shirley has been informed by her husband recently that he has begun divorce proceedings against her in the State of Virginia.

h. In January, 1972, Elizabeth Anderson was required by the Onondaga County Department of Social Services to file a petition of non-support against her husband as a condition of her and her infant daughter's eligibility for Aid to Dependent Children.

i. Mrs. Anderson did not wish to file a petition of non-support against her husband because he was in fact supporting his family in the amount of $100.00 per month. Mr. Anderson's ability to provide support is limited by the fact that he is a full time student living on a fellowship.

j. Because Mrs. Anderson had no resources other than her support payments she was forced to comply with Social Services regulation 369.2(f)(3)(ii)(e) by filing said petition in order to obtain Aid to Dependent Children for herself and her infant daughter.

k. Thereafter Mrs. Anderson requested the Family Court to withdraw her petition. On May 24, 1972, Onondaga County Family Court Judge Peter Kolakowski granted Mrs. Anderson's request and dismissed the petition.

Affidavit in Support of Plaintiffs' Motion for Summary Judgment.

l. Because of her withdrawal of the non-support action, Mrs. Anderson fears that the Onondaga County Department of Social Services will terminate her and her daughter's assistance pursuant to Social Services regulation 369.2(f)(3)(ii)(e).

m. On or about February 1, 1972, Jane Doe received a letter from the Onondaga County Department of Social Services informing her that her daughter Kirsten's assistance would not be paid until Mrs. Doe took Kirsten's father to court and a support order was established.

n. Mrs. Doe had instituted non-support proceedings in the Fall of 1971 against Kirsten's father. Because these proceedings had come to naught, Mrs. Doe could see no utility in going through the same vexatious proceedings again.

o. Kirsten's Aid to Dependent Children grant was terminated February 29, 1972.

p. On April 10, 1972 during the hearing on plaintiff's request for a Temporary Restraining Order in this matter, counsel for defendant Lascaris stipulated to the return of Kirsten to the Aid to Dependent Children rolls because the State Department of Social Services had exceeded the time limitation set by their own regulation for issuing a fair hearing decision.

q. Members of the plaintiff class Rachael Sears and Deborah Scirocco were denied public assistance by Onondaga County Department of Social Services on March 24, 1972 because they refused to sue their parents for non-support.

r. Deborah Scirocco subsequently agreed to file a petition of non-support against her parents even though she has been living separate and apart from them for the last four years. After filing said petition she was granted public assistance.

s. Rachael Sears continues to refuse to prosecute her parents and therefore receives no public assistance.

t. On April 11, 1972 Elizabeth Grainger applied for public assistance for herself and her unborn child. She and her unborn child were denied because she indicated that she did not wish to sue her father for non-support.

u. Forty days thereafter at the hearing in Federal Court on plaintiffs' motion for a Temporary Restraining Order on behalf of Miss Grainger, counsel for defendant Lascaris agreed to reinstate Miss Grainger's April application without requiring her to sue her parents. Defendant Lascaris' counsel had investigated the matter in the interval and had determined that Mr. and Mrs. Grainger were not able to support their daughter.

5. The only outstanding issues raised by this law suit are issues of law. To wit:

a. Whether New York State Social Services regulation 369.2(f)(3)(ii)(e) is unconstitutional under the supremacy clause in that it imposes an additional eligibility requirement for public assistance not called for by the Social Security Act.

b. Whether New York State Social Services regulation 369.2(f)(3)(ii)(e) is unconstitutional in that it denies

equal protection of the law by setting up an invidious and discriminatory class not rationally related to the statutory purposes of the Social Security Act or the State Social Service law.

c. Whether the Department of Social Services practice under Social Services regulation 369.2(f)(3)(ii)(e) offends principles of due process and equal protection by establishing a classification of children based upon conditions which the affected individuals have no power to alter.

d. Whether the relief requested requires a class action.

6. Since there are no material issues of fact between the parties and since the only outstanding questions are questions of law, plaintiffs' motion for summary judgment is proper.

DOUGLAS A. ELDRIDGE.

(Jurat omitted in printing.)

Affidavit in Opposition to Plaintiffs' Motion for Summary Judgment

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing.)

State of New York,
County of Onondaga,
City of Syracuse. } ss.:

JOHN LASCARIS, being duly sworn, deposes and says that:

1. I am the defendant Commissioner of Social Services of Onondage County.

2. I make this affidavit in opposition to the plaintiffs' motion for summary judgment.

3. My opposition is essentially on four grounds:

(a) The named plaintiffs have no standing to sue in their own right, and should not be allowed to represent a "class", since none of them are aggrieved or were aggrieved at the commencement of this action by the state regulation of which they complain.

(b) The lack of standing is especially important in this case, inasmuch as the challenged regulation is apt to be superseded by a new state law which appears to eliminate the plaintiffs' primary complaint—that wives should not be required to sign support petitions against their husbands.

(c) The challenged regulation requires construction by the state court; and the federal court ought to abstain until such construction is rendered.

(d) The challenged regulation is valid on its face, since it is not inconsistent with federal law or regulation, and, indeed, is authorized by a federal regulation.

4. Regarding the named plaintiffs' lack of standing to sue:

(a) This defense was pleaded in my answer to the complaint, a copy of which is submitted herewith. See the first affirmative defense, paragraphs 8-12 of the answer.

(b) Plaintiff Sylvia Shirley, with her two children, has been receiving full assistance allowable since she applied for public assistance on March 8, 1972. She filed a support petition against her husband under the Uniform Support for Dependents Law, without any objection or complaint, and on April 27, 1972, a support order was granted by the Virginia Juvenile and Domestic Relations Law in the amount of $70.00 semi-monthly. A true copy of the court order is annexed hereto and made a part hereof. There is no court proceeding pending, so far as I am aware, to vacate this court order. No action has been taken or is contemplated by my department with respect to Sylvia Shirley under the regulation which she seeks to challenge in this suit.

(c) Elizabeth Anderson and her daughter have been receiving full assistance allowable since she applied for public assistance on January 18, 1972. Although the Family Court granted her motion to dismiss her petition on May 24, 1972, no action has been taken or is contemplated by my department with respect to her welfare grant, since I do not believe that my department should

make a collateral attack upon that determination of the Family Court.

(d) Jane Doe and her children have been receiving full assistance for a number of months. Earlier this year, my department was advised that her child, Kirsten Wynn, was receiving support from her father and consequently assistance for Kirsten was suspended pending verification of this information. The information proved incorrect, however, and assistance for Kirsten was reinstated, with back payments made in full pursuant to a fair hearing decision on April 20, 1972, a copy of which is annexed hereto. But in any event, Kirsten's assistance was not and could not be cut off under the challenged regulation which only authorized discontinuance of assistance to the parent, with no penalty against the child. At no time was the mother's grant affected. Consequently, the challenged regulation has never been involved in Jane Doe's case and she is not aggrieved thereby.

(e) All named plaintiffs are eligible for and have received medical assistance and food stamps.

(f) The moving affidavit seeks to rely on an alleged denial of relief to several minors who allegedly refused to file non-support petitions against their parents. One such case referred to in the moving affidavit is Elizabeth Grainger, whose application to intervene in this suit was withdrawn. My counsel noted on the record just prior to Miss Grainger's withdrawal from the suit that in his opinion the challenged regulation did not apply to the case of a minor applying for public assistance who may have support available from a parent. I concur in my counsel's

reservations about the applicablity of the challenged regulation to a case like that of Miss Grainger. But the existence of a parent able to support a minor, or at least not shown to be financially unable to provide support, is a resource which my department may consider available to the minor.

5. (a) The named plaintiffs' lack of standing is particularly relevant in this case, since the challenged regulation is apt to be superseded by a new state law which would take effect September 1, 1972, and which would not subject wives to loss of assistance solely because they refused to sign a support petition against their husbands.

(b) Attached hereto is a true copy of Assembly 12216, a bill which passed both houses of the New York State Legislature at the 1972 Session and which has been signed by Governor Rockefeller, C. 687 of Laws of 1972. He may have acted upon it by the return date of this motion. The bill has two important differences from the challenged regulation:

(1) The refusal to institute a proceeding for support is not a ground for cutting off the mother's assistance. Only willful failure or refusal to furnish evidence necessary to support a petition, or to furnish information relative to the location of the other parent, constitutes grounds to terminate the parent's assistance so long as she fails to assist or cooperate.

(2) The bill specifically provides in § 4 thereof that it shall be ineffective to the extent that it is determined to be not in compliance with federal law or regulations pertaining to public assistance and care. We do not

know how the State Social Services Department or the State courts will construe the bill with respect to federal regulations.

These differences between the terms of the challenged regulation and the terms of the new bill are especially important in light of the plaintiffs' consession on page 37 of their brief that "All the plaintiffs are asking [is] that the County Commissioner of Social Services' name be in the caption [of a support proceeding] instead of their own." Apparently the new law will satisfy the plaintiff in this regard.

(c) Accordingly, the federal court ought to reject the standing to sue of the named plaintiffs, especially since the anticipated new state law may avoid further litigation.

6. With respect to the policy of the federal courts to stay their hand pending construction of a state law or regulation by state courts, I am advised that a recent case in point is *Russo vs. Kirby*, 453 F.2d 548 at 552 (2d Cir. 1971), citing *Reetz vs. Bozanich*, 397 U. S. 82 (1970).

7. If the court determines to reach the merits of the challenged regulation, then I submit that it is valid on its face, since it is not inconsistent with federal law or regulation and, indeed, is arguably authorized by a federal regulation—a regulation, it may be added, that none of the federal cases cited by plaintiffs appear to have considered or had called to their attention.

8. The vice of the regulations challenged in the Oregon, California and Illinois cases cited by plaintiffs is that the children were disqualified from further assistance in each of those cases. The federal courts held that the children could not be penalized under the federal regulations. Although those decisions appear to be inconsistent with the holding of *Wyman vs. James,* 400 U. S. 309 (1971), the point is academic because the challenged New York State regulation does not cut off the child's right to assistance.

The Illinois case, *Doe vs. Swank,* 332 F. Supp. 61, enjoined defendants from denying assistance "to a dependent child", or from conditioning "aid to a dependent child upon the mother's cooperation" (332 F. Supp. at 63). Nothing was decided as to the mother's eligibility.

The Oregon case, *Meyers vs. Juras,* 327 F. Supp. 759, enjoined a regulation denying assistance to the child as well as the mother. The court said at 762: "Neither do we hold that the State of Oregon may not seek the A.F.D.C. mother's cooperation through means less drastic than the withdrawal of benefits *from her children.*" (Italics added).

The California case, *Taylor vs. Martin,* 330 F. Supp. 85, also enjoined a regulation denying assistance to the *children* for the mother's refusal to sign a criminal complaint against her spouse.

9. Plaintiffs contend in their brief that HEW regulations do not authorize withdrawing assistance to the mother for her refusal to cooperate in locating or prosecuting her husband. But plaintiffs do not refer to the following HEW regulations relating to "conditions of eligibility"

in furnishing assistance (Part 233 of Title 45). Specifically, regulation 233.20(a)(3)(ii) requires every state plan for ADC to provide that in setting financial eligibility and the amount of assistance payments:

> "(d) current payments of assistance will not be reduced because of prior overpayments unless the recipient has income or resources currently available in the amount by which the agency proposes to reduce payment; except that where there is evidence which clearly establishes that a recipient willfully withheld information about his income or resources, such income or resources may be considered in the determination of need to reduce the amount of the assistance payment in current or future periods; and (e) income and resources will be reasonably evaluated."

Further, in regulation 233.20(a)(3)(ix), the state plan must

> "Provide that the agency will establish and carry out policies with reference to applicants' and recipients' potential sources of income that can be developed to a state of availability."

10. It is submitted that a husband's support is a potential resource as to which the state has a right, and indeed, a duty to establish a policy designed to develop this potential source of income to a state of availability, and, further, that when a mother willfully withholds information about such source of income, thereby preventing income from being developed and reasonably evaluated, the state has the right and indeed the responsibility

to withhold assistance to the parent. Compare *Snell v. Wyman*, 281 F. Supp. 853, aff'd. 393 U.S. 323 (1969).

11. For all of the foregoing reasons, the plaintiffs' motion for summary judgment should be denied and the complaint should be dismissed.

s/ JOHN LASCARIS.

Order of Substitution

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing.)

This matter having come on by Order to Show Cause before the undersigned judge on the motion of the Plaintiff for leave to drop George K. Wyman as a defendant and replace him with his successor in office, Abe Lavine, it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiff is authorized to drop George K. Wyman as a defendant in this action and replace him with his successor in office, Abe Lavine.

EDMUND PORT,
United States District Judge.

Dated: Auburn, N. Y., May 24, 1972.

Transcript of Decision of Three Judge Court

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

versus

GEORGE K. WYMAN, as Commissioner of the Department of Social Services of the State of New York;

and

JOHN LASCARIS, as Commissioner of the Department of Social Services of the County of Onondaga; individually and in their official capacities.

Civil No. 72-CV-163.

A hearing in the above-entitled matter was held pursuant to notice at the United States District Court held in and for the Northern District of New York, at Syracuse, New York, on Wednesday, June 7, 1972, at two o'clock p. m. before Hon. Walter R. Mansfield, Circuit Court Judge and Hon. James T. Foley and Hon. Edmund Port, United States District Court judges for the Northern District of New York.

Appearances:

Douglas A. Eldridge, Esq., and David Cumming, Esq., Attorneys and Counsellors at Law, Syracuse, New York, appearing in behalf of the Plaintiffs,

and

Hon. Louis J. Lefkowitz, Attorney General of the State of New York, Albany, New York, By: Sidney Grossman,

Esq., Assistant Attorney General, Syracuse, New York, Of Counsel, appearing in behalf of Commissioner George K. Wyman; and

Philip C. Pinsky, Esq., Attorney and Counsellor at Law, South Warren Street, Syracuse, New York, appearing in behalf of the Commissioner John Lascaris.

3:40 p. m.

Judge Mansfield: Gentlemen, after discussing your arguments, which have been very helpful and reviewing some of the points that were discussed I think we are in a position to render a decision on the matter that is before us. I have made—I scribbled a few notes here as have my colleagues and I will attempt to give you our decision now and after I have done so an order can be submitted in due course.

As I see it, we are here confronted with a motion for summary judgment in what purports to be a class action challenging the legality of this one section of the New York State Department of Social Services regulation called 369.2(f)(3)(II)(e), and the challenge as we see the papers is a challenge of the legality of that regulation insofar as it has been interpreted by the Department of Social Services and by the Commissioner to require those applying for aid to families with dependent children to file petitions for non-support against the deserting spouses as a condition to receiving relief, or to prosecute such petitions.

The plaintiffs contend that that regulation violates both the 14th Amendment's equal protection clause and the

aid to family with dependent children section of the Social Security Act of 1935, which is under 42 U.S. Code Section 601, 602 and the following sections, and that it violates the regulations that were promulgated by the Secretary of Health, Education and Welfare thereunder.

We find it unnecessary to go into the constitutional questions that have been presented. We do think that the matter can be disposed of by reference to the appropriate sections of the Social Security Act and the regulations promulgated under it.

In 1950, as I believe you all know, Congress amended the Aid Section of the Social Security Act as the law appears in that Section 602-e to provide that beginning in 1952 the State AFDC plan must provide that prompt notice to appropriate law enforcement officials and the granting of aid to dependent families with children in respect to a child that has been abandoned by parent, that has commonly been referred to as "Notice to Law Enforcement Officials" was in the instigation of the Welfare administration noleo.

Now New York's noleo regulation is a regulation to which we referred and it provides in pertinent part under a heading entitled "Abandonment and Desertion": "That a parent or other relative who fails to cooperate with the Social Services official in the location and prosecution of the deserting or abandoning parent shall be ineligible for public assistance and such failure to cooperate shall in appropriate cases be brought to the attention of the Family Court for whatever action the Court may wish to take under such circumstances."

There is another regulation that I think is pertinent here and that is the one I referred to earlier, 457 of federal regulation 235.70, issued by the Secretary of Health, Education and Welfare, which provides under the title of "Notice to Law Enforcement Officials" that a State plan under the AFDC title must provide that the appropriate law enforcement officials in writing promptly as soon as AFDC has been furnished with respect to a child who has been deserted or abandoned by a parent, and I quote: "This requirement has no effect upon the determination of eligibility. This is a requirement upon the Agency and is fulfilled by providing the following information after the family has been found eligible and has been granted assistance." And then there continues provisions with respect to the information.

Now the plaintiffs are mothers with dependent children living as family units with their children. Each is receiving full assistance including assistance for the child and for themselves under AFDC. Each was advised that unless they cooperate in instituting a suit against the deserting parent that payments would be denied.

As we see the record, the plaintiff Doe refused to reinstitute an action after having once instituted an action which was unsuccessful. Mrs. Shirley has reinstituted an action, claiming that she was required and has instituted it and prosecuted it under protest. Mrs. Anderson has withheld a petition but did at one time institute a petition for non-support against the deserting parent. And what it boils down to is that some of these plaintiffs have filed petitions and contend that they have done so under duress and that they felt that they might be suspended, that remu-

neration of aid or initial refusal to give it to them as mothers of dependent children unless these actions were instituted or prosecuted.

Now the defendants, as we know, are the Commissioner of the Department of Social Services of the State of New York and the Commissioner of the Department of Social Services of the County of Onondaga. After a full review of these facts as interpreted by the parties in their briefs the only justiciable issue that we see presented by these facts is the legality of the requirement that a parent or other relative who fails to institute or prosecute an action, a non-support action against a deserting or abandoning parent be a condition of eligibility for relief.

Jurisdiction I think, is clear and it is undisputed. It is founded on Title 28 United States Code Section 1343.3 and 4, and that is uncontested. A three-judge court was sought in April and Judge Port on April 18th ordered that a three-judge court be convened. We all subscribe to the propriety of that action. All requirements of Title 28, United States Code Section 2281 have been met. This is clearly a case for a three-judge court. A State officer and the Commissioner of Social Services is a party defendant. The city challenges a State regulation of state-wide application. Injunctive relief is sought and it is alleged that the state regulation violates the 14th Amendment.

As I said earlier we do not think it is necessary to go into the question of the 14th Amendment for the reason that it can be disposed of in the Social Security Act. And as I think you are all aware, the Supreme Court has within the last two or three years repeatedly said that where

a case of this character can be disposed of on a non-constitutional ground we should do so.

Now there is a contention here that the plaintiffs sue on behalf of members of a class, and while the record in that respect is not entirely clear, we are satisfied that a sufficient showing has been made pursuant to Rule 23(b)(2) of the federal rules of civil procedure to warrant this being declared a class suit to the extent that the class includes mothers of dependent children who have been required to institute or to prosecute non-support proceedings against abandoning or deserting parents of the child as a condition of receiving welfare relief of assistance under the A.F.D.C. provisions. That would be the extent of any class action in this case as we see it on the record before us.

Now I think we can briefly touch on one objection that has been raised by the papers but not mentioned in argument, and that is the argument that there has been a failure here to exhaust administrative remedies and that the action should therefore be discontinued. We disagree with that contention. We see no need for a requirement that administrative remedies be exhausted in this case.

We are, of course, familiar with the decision of the Second Circuit in Eisen against Eastman, but that case, that decision, insofar as it required exhaustion of administrative remedies as a condition to the institution of a federal suit was careful to point out that the exhaustion would not be required where it would be a futile act. We think this case falls squarely within that exception.

The Commissioner of Social Service and the hearing examiners in an administrative proceeding here would be powerless to declare unlawful a regulation of the Social

Service law in the State of New York. Therefore I can't see—or we can't see what purpose would be served by a State administrative remedy in this case. Accordingly we find it unnecessary for the plaintiffs to have exhausted their administrative remedies.

Now the argument that has been made at considerable length here is that the plaintiffs lack standing. And the contention of the State and the County is that each of the named plaintiffs is already receiving legal aid—I mean not legal aid but welfare assistance under the A.F.D.C. provisions in the full amount to which she is concededly entitled and therefore they have no standing to challenge the validity of the State's noleo regulation to the extent we have indicated it is being challenged.

The plaintiffs of course contend that they have complied with it, or the interpretation of it, in instituting and prosecuting non-support suits under protest and that they did it because they were afraid that unless they did it support might be withdrawn.

As we see it this is clearly a case where the people who are seeking relief do have a sufficient personal stake in the outcome to assure that the Court is being called upon and will resolve real issues between genuine adversaries rather than merely to give an advisory opinion with respect to something that is theoretical.

These papers, and I am referring now to the affidavits of the plaintiffs and the exhibits that are attached to the moving papers, point out a sufficient number of facts and details that are undisputed to convince us that these plaintiffs are academic personages that have come in because they have an interest in getting an interpretation of welfare laws in which they have no immediate interest.

We are satisfied by the indication that while they are obeying the regulation as it has been interpreted they do have genuine fear that the enforcement will harm them and they have a desire to avoid the necessity of having to prosecute or continue prosecuting non-support actions as a condition of the institution of receiving relief.

Now we turn then to the merits, and as we see it, the merits of this case, to the extent that it presents a judicial issue have been fairly classed by the decisions of the Supreme Court of the United States affirming the three-judge court decisions in Taylor against Martin, 330 F. Supp. 85, which was affirmed *per curiam* at 404 U. S. 980; and in Meyers against Juras, 327 Fed. Supp. 759, and was affirmed *per curiam* by the United States at 404 U. S. 803.

In those cases the Courts, and in other cases which I have not mentioned, and lastly Doe against Swank, at 332 Fed. Supp. 61, which was affirmed by the name of Weaver against Doe, 404 U.S. 987. Now those decisions as well as other district court decisions all declared unconstitutional similar statutes or regulations by States which refused A.F.D.C. benefits to the child of a parent who refused to cooperate with authorities by starting court proceedings against the parent for non-support.

New York's noleo regulation of course applies to cases where a parent or other relative fails to cooperate in prosecuting the deserting spouse and imposes, as it has been interpreted, imposes such prosecution as a condition. Now the State seeks to distinguish the New York noleo provision as it has been interpreted on the ground that here the State would be paying the relief to the parent rather than to the child.

We see no substance to that distinction. We believe that the provision to the extent that it requires the parent to bring suit and denies relief to the parent for failure to bring suit is equally appealable under the provisions of the Social Security Act and regulations I have mentioned. In short, as we see it, the effect is to do or to set up an additional eligibility requirement before A.F.D.C. aid can be received, which is contrary to what Congress provided and what the Secretary of Health, Education and Welfare has provided.

We also feel that the distinction based upon the fact that here the aid would be denied to a mother instead of directly to the child is an illusory one. The program being administered here, by its very title is "Aid to families with dependent children". And Section 401 of the Social Security Act, that is 42 U.S.C. 601, refers repeatedly to the motivation which is to furnish financial assistance to dependent children and the parents or relatives with whom they are living. Particularly as a practical matter, and I think counsel all did concede this, that the denial of the relief to the mother, or her share of the relief, would visit just as much harm and hardship upon the child because it would be unrealistic not to appreciate that the mother would then be forced to turn to the portion allocated to the child in order to support the family unit.

This very question, as Judge Foley pointed out earlier, was before the District Court in Connecticut, in Doe against Harder, 310 Fed. Supp. 302, where the appeal was dismissed for lack of jurisdiction in 399 U.S. 302; and another case, Doe against Shapiro, 302 Fed. Supp. 761, appeal dismissed 396 U.S. 397.

That was the case where Judge Smith initially made the suggestion attributable to him by Judge Foley here, and later a three-judge court held the Commissioner of Connecticut State Welfare Department in contempt for refusing or creating an additional eligibility requirement that would in effect deny a mother for failure to disclose the identify of the illegitimate child's father.

Now under all of the circumstances we feel that the plaintiffs here having satisfied to the extent indicated the class action statute are entitled to some relief. And we are prepared accordingly to grant the plaintiffs' motion, and grant it to the extent of declaring, pursuant to the declaratory judgment sections of Title 28, and I refer to Sections 2201 and 2202, and of course the rule 57 of the federal rules of civil procedure, that New York's noleo regulation that the purpose—with the numerous laws I read earlier, violates the Social Security Act of 1935; the 42 U.S. Section 602 of the regulations issued thereunder, and I refer specifically to the one I mentioned earlier,—45 Code of federal regulations, Section 235.70, to the extent that it requires or is interpreted by the defendants to require the parent or a relative of dependent children to file or to prosecute a non-support action against abandoning or deserting parents of such child as a condition to receiving additional aid or continued aid under the A.F.D.C. provisions of the Social Security Act.

We also grant summary judgment to the plaintiff to the extent of holding that the plaintiff would be entitled to an injunction restraining the defendants from terminating or denying public assistance to the plaintiffs or to members of the class as I have previously defined it, or because of a failure or refusal of the plaintiffs or members of the class

as so defined to initiate or to continue prosecution of non-support suits against parents who have abandoned or deserted the child in question.

To this extent summary judgment appears to be warranted in favor of the plaintiffs, otherwise it is denied. And of course the defendants' cross motion for summary judgment, which I believe was made orally, if not being made in writing, is denied.

Now we have delivered this informal opinion on the record because of the importance of the issues. However since it is informal, I would like to ask my colleagues on this Court whether they wish to change or modify it or interpret anything that I have said on our behalf. Judge Foley?

Judge Foley: No. I think it was splendidly done. Of course it shows research on the part of Judge Mansfield. I do think in reference to the two citations you gave in Connecticut by the three-judge court there might have been a transposition of the numbers. The first was Doe against Shapiro, 302 Fed. Supp. 761. After that Judge Smith decided again in Doe against Harder, 310 Fed. Supp. 302. And that is the only changes that I think are necessary.

Judge Mansfield: You are quite correct. Judge Port?

Judge Port: I would conclude by saying that I concur except that I would like to correct in the record what I think was a slip of the tongue. In referring to the District Court cases on which the court ruled, if I am not mistaken Judge Mansfield said that they were declared unconstitutional. I think that the intention was to state that they were violative of the Act and the regulations.

That concludes my comments, but I would like to briefly confer with the other judges about a couple of other matters.

Judge Mansfield: First let me concur in what Judge Port has said, that those decisions to which I refer, including the ones that were entered *per curiam* by the Supreme Court relate to violations of the Social Security Act were not decided on constitutional grounds.

(Discussion held between the three justices outside the hearing of the Court Reporter.)

Judge Mansfield: Gentlemen, we would request counsel to submit an order to the judges in accordance with what we have found here this afternoon in deciding. I think that ought to be done on notice and stipulation, if possible.

Now Judge Port has directed that the named defendants would issue a directive to the defendant Lavine to issue a directive to all the Social Service offices in New York in conformity with the decision and the order, and in that connection of course your attention is referred to the provisions that are contained in the Health, Education and Welfare's handbook which is quoted from rather liberally on Page 14 of the Plaintiffs' brief.

One other feature that perhaps ought to be defined, and that is that the class as described by me was the mothers of dependent children who have been required to institute non-support proceedings as against the abandoning spouse. That should be modified to the care of a relative who is required to take such action as a condition. Aside from that I don't think there is anything further we wish to add.

That will terminate the proceedings.

Mr. Eldridge: I am not sure how this leaves other members of the plaintiff class who are not named plaintiffs here. Are they to be re-instated retroactive to the time even on failure to file a petition?

Judge Mansfield: Well the case is limited to those who have been required to institute non-support proceedings. Now your question is whether or not they get the benefit of this.

Mr. Eldridge: Well assuming the mother has refused to institute proceedings and has been denied or terminated, would she be entitled under this order to retroactive reinstatement?

Judge Mansfield: I think if she falls within the class and if she establishes that she was required to institute a non-support proceeding or to prosecute a non-support proceeding against the abandoning parent of the child as a condition to receiving aid, then you would interpret the judgment and she would fall within the class.

Mr. Eldridge: Thank you, Your Honor.

Judge Mansfield: A class action does not necessarily mean that a plaintiff—I am sure you are aware of this—who may be a member of the class automatically walks up to the window and says "here is my judgment, now pay me some money." The plaintiff may very well have to prove more facts before she qualifies.

I think we ought to make one thing clear. We are not including in this class, as you have presented the class, people who have been unable to obtain relief in the past. As we see it, this is a class of all people who have received relief. You don't represent anybody who is not presently receiving relief.

If someone is terminated, that is a different situation.

Thank you, gentlemen.

(Whereupon this proceeding was terminated.)

Reporter's Certification

I, F. ROBERT JORDAN, Official Court Reporter for the United States District Court held in and for the Northern District of New York, do certify the foregoing to be a true and accurate transcription of the stenographic notes as taken by me during the aforesaid proceedings

F. ROBERT JORDAN,
Official Court Reporter,
Northern District of N. Y.

Albany, N. Y.
June 22, 1972.

Order of Three Judge Court

Copy
U. S. District Court
N. D. of N. Y.
Filed
Jul 21 1972
At .... o'clock .... M.
J. R. Scully, Clerk
Utica

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Plaintiffs.

vs.

ABE LAVINE, as Commissioner of the Department of Social Services of the State of New York,

JOHN LASCARIS, as Commissioner of the Department of Social Services of the County of Onondaga; individually and in their official capacities,

Defendants.

Index No. 72-CV-163.

ORDER

This action having come to trial before the Court of three judges on Plaintiffs' motions for a class order, preliminary and permanent injunction, declaratory judgment and summary judgment; and based on the pleadings, affidavits, exhibits and memoranda, and also the representations and arguments of counsel in open court, it is

ORDERED, that the action is found to be a class action, the class consisting of mothers and relatives of dependent children who have been required to institute or prosecute actions for non-support against deserting or abandoning parents of the dependent child or children receiving AFDC, and

ORDERED, that summary judgment be granted plaintiffs:

a. Declaring that New York Social Services Regulation 369.2(f)(3)(ii)(e) violates the Social Security Act and regulations promulgated thereunder to the extent that it requires parents or relatives of needy and dependent children to institute and prosecute non-support actions against abandoning or deserting parents or spouses as a condition of eligibility for AFDC, and

b. Ordering that a permanent injunction issue restraining defendants from terminating or denying AFDC to members of the plaintiff class because of their failure or refusal to institute or prosecute actions for non-support, and

ORDERED, that defendant Lavine immediately issue an order to each County Commissioner of Social Services in the state informing said Commissioners of the invalidity of 369.2(f)(3)(ii)(e) to the extent stated above, and that they must immediately desist from terminating or denying AFDC to members of plaintiffs' class for their refusal to institute or prosecute actions for non-support, and

ORDERED, that this order is not retroactive but shall take effect June 7, 1972.

Dated this 14th day of July, 1972.

WALTER R. MANSFIELD,
United States Circuit Judge.

JAMES T. FOLEY,
United States District Judge.

EDMUND PORT,
United States District Judge.

Notice of Appeal of State Appellant

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing.)

Notice is hereby given that defendant Abe Lavine, individually and as Commissioner of the Department of Social Services of the State of New York, hereby appeals to the Supreme Court of the United States from the final order entered in this action on July 21, 1972 granting plaintiffs summary judgment declaring that New York Social Services Regulation 369.2(f)(3)(ii)(e) violates the Social Security Act and regulations promulgated thereunder to the extent that it requires parents or relatives of needy and dependent children to institute and prosecute non-support actions against abandoning or deserting parents or spouses as a condition of eligibility for AFDC and granting injunc-

tive relief implementing that determination, and defendant Lavine appeals from each and every part of that order.

This appeal is taken pursuant to 28 USC § 1253.

Dated: Albany, New York, August 7, 1972.

LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York,

By JEAN M. COON,
Assistant Solicitor General,
Attorney for Defendant Lavine,
Department of Law,
The Capitol,
Albany, New York 12224,
Telephone: (518) 474-7138.

To:

Honorable J. R. Scully, Clerk,
United States District Court for the
Northern District of New York,
Federal Building,
Utica, New York 13503.

Douglas A. Eldridge, Esq.,
Onondaga Neighborhood Legal Services, Inc.,
633 Warren Street,
Syracuse, New York 13202,
Attorney for Plaintiffs.

Leonard C. Koldin, Esq.,
Onondaga County Welfare Attorney,
600 South State Street,
Syracuse, New York 13202,
Attorney for Defendant Lascaris.

Notice of Appeal of County Appellant

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing.)

Notice is hereby given that defendant John Lascaris, Individually and as Commissioner of the Department of Social Services of the County of Onondaga, hereby appeals to the Supreme Court of the United States from the final order entered in this action on July 21, 1972, granting plaintiffs summary judgment declaring that New York Social Services Regulation 369.2(f)(3)(ii)(e) violates the Social Security Act and regulations promulgated thereunder to the extent that it requires parents or relatives of needy and dependent children to institute and prosecute non-support actions against abandoning or deserting parents or spouses as a condition of eligibility for AFDC and granting injunctive relief implementing that determination, and defendant, John Lascaris, appeals from each and every part of that order.

This appeal is taken pursuant to 28USC § 1253.

Dated: Syracuse, New York, August 10, 1972.

PHILIP C. PINSKY,
Chief Welfare Attorney,
Attorney for Defendant John Lascaris,
Onondaga County Department of
Social Services,
600 South State Street,
Syracuse, New York 13202,
(315) 477-7125.

Notice of Appeal of County Appellant.

To:

Hon. J. R. Scully, Clerk,
U.S. District Court for the
Northern District of N.Y.,
Federal Building,
Utica, New York 13503.

Douglas A. Eldridge, Esq.,
Attorney for Plaintiffs,
Onondaga Neighborhood Legal Services, Inc.,
633 Warren Street,
Syracuse, New York 13202.

Louis J. Lefkowitz, Attorney General,
By: Jean M. Coon, Assistant Solicitor General,
Attorney for Defendant Abe Lavine,
Department of Law,
The Capitol,
Albany, New York 12224.

Letter Dated December 11, 1972

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

Department of Law
Received
Dec 13 1972
Albany, N. Y.

Solicitor General
Docket Clerk
Mr. Rubenstein

December 11, 1972

Mrs. Ruth Kessler Toch
Solicitor General of New York
Dept. of Law—The Capitol
Albany, N.Y. 12224

Re: Lavine, etc. v. Shirley, etc., *et al.*,
No. 72-582

Dear Mrs. Toch:

The Court today entered the following order in the above-entitled case:

The judgment is vacated and the case remanded to the United States District Court for the Northern District of New York for further consideration in light of Chapter 687 of the 1972 Laws of New York (New York Social Services Law § 101-a as amended). *Diffenderfer v. Central Baptist Church*, 404 U.S. 412 (1971).

Very truly yours,

MICHAEL RODAK, JR.,
Clerk

By HELEN TAYLOR
Helen Taylor, (Mrs.)
Assistant Clerk

Letter Dated December 11, 1972.

Copies to:

Douglas A. Eldridge, Esq.
Onondaga Neighborhood
Legal Services, Inc.
633 South Warren St.
Syracuse, N.Y. 13202

Philip C. Pinsky, Esq.
Onondaga County Welfare
Attorney
600 South State St.
Syracuse, N.Y. 13202

Hon. Richard C. Turner
Attorney General of Iowa
State Capitol
Des Moines, Iowa 50319

Entered in Docket
Dec 13 1972

AIRMAIL

Order to Show Cause Dated March 14, 1973

UNITED STATES DISTRICT COURT

For the Northern District of New York

(Title omitted in Printing.)

Upon the Order of the United States Supreme Court remanding the above captioned action for reconsideration and upon the verified complaint and affidavits of Anna Stuck, Richard Hunt and James Bringley, it is

ORDERED that the Defendants Abe Lavine and John Lascaris show cause in the Court Room of the United States Post Office, Clinton Square, Syracuse, New York, on the 9th day of April 1973 at 10:00 A.M. or as soon thereafter as Counsel can be heard, why an order should not issue or the Court take such other action as shall grant the Plaintiffs herein the following relief:

1. Reconvening of the three-judge court pursuant to the remand order of the United States Supreme Court to reconsider the decision of the three-judge court in light of New York Social Services Law 101-a(2) (3).

2. Granting the motion to amend the complaint so as to include New York Social Services Law 101-a(2) (3), as required by the Supreme Court.

3. Granting the motion to intervene Anna Stuck as a Plaintiff aggrieved by the operation of New York Social Services Law 101-a(2) (3), pursuant to Rule 24-b(2) of the Federal Rules of Civil Procedure because there are questions of law and fact in her case similar to those in the main action.

IT IS ORDERED that service of this order on Defendants on or before 5:00 P.M. on the 21st day of March, 1973, be deemed sufficient.

Done and ordered at New York, New York, on this 14th day of March, 1973, at 12:20 o'clock in the afternoon.

s/ WALTER R. MANSFIELD,
United States Circuit Judge.

Affidavit in Support of Order to Show Cause

State of New York,
County of Onondaga,
City of Syracuse. } ss.:

MISS ANNA STUCK, being duly sworn, deposes and says that:

1. She is 35 years of age and resides at 400 Wyoming Street, Syracuse, New York, with her four minor children ages 12, 9, 8, and 2½.

2. She has been a recipient of ADC benefits since 1970.

3. In response to the Onondaga County Department of Social Services' request that Miss Stuck appear for her biannual recertification for public assistance, Miss Stuck went to the Onondaga County Department of Social Services on or about February 2, 1973.

4. She spoke with Ms. Peters, welfare examiner. Ms. Peters inquired why Miss Stuck had not filed a paternity

action for her youngest child, Susan. Miss Stuck told Ms. Peters that she did not want to file such a paternity action because Susan's natural father is disabled and presently unable to support her. Additionally she did not wish to file such an action because she had previously filed a paternity action against the father of her three other children, and that filing resulted in continual dissension between her and the father of her first three children.

5. She does not wish to participate in a paternity action against the father of her youngest child because she fears that such participation will jeopardize her relationship with Susan's father.

6. Miss Stuck did tell Ms. Peters who the father of her youngest child is and his present location.

7. Notwithstanding the above, on or about February 6, 1973, she received a notice of intent to reduce her public assistance from $357.00 a month to $285.60 a month. The reason given by the Department for such a reduction was "failure to comply".

8. On further discussion with her caseworker, Miss Stuck learned that the reason she had been removed from the public assistance grant was her refusal to file a paternity action against the father of Susan.

ANNA STUCK.

(Trial omitted in printing.)

Affidavit in Support of Order to Show Cause

State of New York, County of Onondaga. } ss.:

RICHARD V. HUNT, being duly sworn, deposes and says that:

1. He is an attorney associated with Onondaga Neighborhood Legal Services, Inc.

2. On February 6, 1972, Anna Stuck came into his office carrying a written notice of a reduction of her grant.

3. The notice indicated that it was "for the mother's (Anna Stuck's) failure to comply", but Anna Stuck was not sure as to how she failed to comply.

4. To ascertain the reasons for the reduction, Richard Hunt attempted to call the zone supervisor listed on the notice of reduction, but he was unable to contact him.

5. He then asked for A. Peters, the caseworker, who was there.

6. The caseworker stated that Anna Stuck was cut-off from the grant because she has failed to either institute a paternity suit on behalf of one of her children or to ask the Department of Social Services to institute the suit. She went on to say that Anna Stuck had mentioned the names of two men and that there was no reason each one could not pay half. A. Peters stated finally that she had discussed the case with her supervisor, T. Lynch, and that he concurred with her decision.

RICHARD V. HUNT.

Sworn to before me this
7th day of February, 1973.
Susanne M. Meip,
Commissioner of Deeds, Syracuse, N.Y.
Commission Expires 12/31/74.

Affidavit in Support of Order to Show Cause

State of New York,
County of Onondaga, } ss.:
City of Syracuse.

JAMES BRINGLEY, being duly sworn, deposes and says:

1. That he is 25 years of age and resides at 804 Hawley Avenue, Syracuse, New York.

2. That he is employed at Onondaga Neighborhood Legal Services, Inc., in the capacity of a law assistant.

3. That on February 28, 1973, he contacted Mrs. Mary Miller, an intake supervisor for Onondaga County Department of Social Services.

4. That he asked her what the Department of Social Services' procedure was when they encountered an applicant for public assistance who appeared to have a responsible relative who was not providing her with support.

5. Mrs. Miller responded, "We ask if the recipient will file a non-support petition against the relative, and further state that this is not a condition for eligibility. If the applicant is not willing to file a non-support petition, we request the applicant to give us permission to file a petition of non-support. The response to this question affects the applicant's eligibility. The Intake Unit has been instructed by the Legal Division of the Onondaga County Department of Social Services to deny public assistance to those applicants who refuse to give permission to the department to file a non-support petition."

JAMES BRINGLEY.

Subscribed and sworn to before me this
28th day of February, 1973.
Douglas A. Eldridge,
Notary Public in and for the State of New York.
Onondaga County, No. -G168918.
My Commission Expires March 30, 1974.

Order Granting Leave to Amend Complaint and Permitting Intervention

Copy

U. S. District Court
N. D. of N. Y.
Filed
Apr 18 1973
At ..... o'clock ..M.
J. R. Scully, Clerk
Utica

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

(Title omitted in Printing.)

This matter having come on by Order to Show Cause before the undersigned three judges on the remand order of the United States Supreme Court and on the motion of the Plaintiffs for leave to amend their complaint to comply with the Supreme Court's remand order and to intervene Anna Stuck as a Plaintiff, it is hereby

Order Granting Leave to Amend Complaint and Permitting Intervention.

ORDERED, that the Plaintiffs are authorized to amend their complaint so as to comply with the remand order of the Supreme Court by bringing the question of the validity of New York Social Services Law 101-a(2) (3) before this Court, and

ORDERED, that Anna Stuck may intervene as a Plaintiff in the action.

Dated this 9th day of April, 1973.

WALTER R. MANSFIELD,
United States Circuit Judge.

JAMES T. FOLEY,
United States District Judge.

EDMUND PORT,
United States District Judge.

Amended Complaint

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

and

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Plaintiffs.

vs.

ABE LAVINE, as Commissioner of the Department of Social Services of the State of New York,

and

JOHN LASCARIS, as Commissioner of the Department of Social Services of the County of Onondaga; individually and in their official capacities,

Defendants.

Index No. 72-CV-163.

I

PRELIMINARY STATEMENT

This is a class action brought by plaintiff mothers of needy and dependent children on behalf of themselves, their minor children and all others similarly situated. Plaintiff mothers have been required by the Department of Social Services to file themselves, or to cooperate with the Department's filing of, petitions of non-support or paternity in Family Court against the fathers of their children as a condition of eligibility for public assistance in the Aid to Dependent Children category. Such petitions having been filed, plaintiff mothers are required to cooperate in pro-

ceedings in Family Court under the threat of loss of Aid to Dependent Children benefits.

The requirement of cooperating in the filing and prosecuting of petitions of non-support as a condition of eligibility for Aid to Dependent Children has been held illegal as in conflict with the Social Security Act by the United States Supreme Court. Such a requirement violates Federal Regulations promulgated under the Social Security Act. Further, such a requirement violates the rights of plaintiffs and their minor children and all others similarly situated, which are secured by the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

Termination of intervening Plaintiff Anna Stuck and the threat of termination of the other named members of the plaintiff class should they refuse to cooperate in naming, locating and prosecuting putative or non-supporting fathers causes the members of the plaintiff class to suffer grave harm to their health, safety and spirits. The harm is immediate and if the relief prayed for herein is not granted, will become irreparable.

II

NATURE OF ACTION

This is a class action brought by plaintiffs on behalf of themselves and as next friend of their children and on behalf of all others similarly situated for a Declaratory Judgment pursuant to Title 28 U.S.C. §§ 2201, 2202, to declare that New York State Social Services Law 101-a(2) and (3) (L.1972 C.687), on their face and as interpreted

and applied by the defendants have denied plaintiffs and others similarly situated public assistance in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution, the Social Security Act (42 U.S.C. 601 *et seq.*) the regulations promulgated thereunder, and Title 42 U.S.C. Sections 1983 and 1988 insofar as Social Services Law 101-a(2)(3) on its face and as applied provides that a mother must file and prosecute a petition of non-support or paternity against the father of her children and must cooperate in naming and locating and furnishing evidence against the respondent as a condition of her eligibility for public assistance.

III

JURISDICTION

Original jurisdiction is conferred upon this Court by 42 U.S.C. Section 1343(3)(4) which authorizes federal courts to enforce rights, privileges and immunities derived from 42 U.S.C. Section 1983, the Fourteenth Amendment, 28 U.S.C. Section 1331 relating to actions arising under any federal statute, and 28 U.S.C. Section 2201 relating to Declaratory Judgments.

This action also seeks a Temporary Restraining Order and a preliminary and permanent injunction to enjoin the defendants from denying public assistance to plaintiffs and all other similarly situated for their refusal to name the father of their children or to disclose his whereabouts or to cooperate in paternity or non-support proceedings on the ground that New York State Social Services Law 101-a(2)(3) violates the Fourteenth Amendment of the United States Constitution, and Title 42 of the U.S.C. Section 601-609, 1983 and 1988.

IV

THREE JUDGE COURT

Plaintiffs respectfully request that a three-judge district court be convened. Such a court is required under 28 U.S.C. Section 2281 because plaintiffs seek to enjoin the enforcement of New York State statute of state-wide application on the ground that the statute contravenes the Fourteenth Amendment to the United States Constitution.

V

PLAINTIFFS

Plaintiffs are citizens of the United States and of the State of New York.

Intervening Plaintiff Anna Stuck lives with her four minor children ages 12, 9, 8, and 2½, at 400 Wyoming Street, Syracuse, New York. The family's sole means of support is their public assistance grant plus court ordered support payments in the amount of $15.00 per week.

Plaintiffs are members of a class composed of New York resident families, otherwise eligible for benefits under the Aid to Dependent Children program administered by Defendants, who have been required to cooperate in naming, locating and prosecuting putative or non-supporting fathers as a condition of the mother receiving Aid to Dependent Children benefits pursuant to New York Social Services Law 101-a(2) (3).

VI

CLASS ACTION

This is a proper class action pursuant to Rule 23 of the Federal Rules of Civil Procedure in that persons in the class are so numerous that joinder of all members is impractical. There are questions of law or fact common to the class; the claims of the representative parties are typical of the claims of the class, and the representative parties will fairly and adequately protect the interests of the class. The class consists of Aid to Dependent Children recipients who have been required to cooperate in naming, locating and prosecuting putative or non-supporting fathers as a condition of the mother receiving Aid to Dependent Children benefits pursuant to New York Social Services Law 101-a(2) (3).

VII

DEFENDANTS

Defendant Abe Lavine is Commissioner of the Department of Social Services in the State of New York, and Defendant John Lascaris is the Commissioner of the Department of Social Services of the County of Onondaga, in which capacities they are charged with administering the welfare laws and policy of said state, including New York Social Services Law 101-a(2) (3).

VIII

STATEMENT OF CLAIM

Intervening Plaintiff Anna Stuck has been receiving public assistance for herself and her four infant children since 1970. She was required by the Onondaga County Department of Social Services to appear at their offices for the biannual recertification of her eligibility for public assistance. She did so on February 2, 1973. She was told that she must bring a paternity action against the father of her youngest child herself, or authorize the Department to do so, and that she must cooperate fully with the Department in such an action. She refused to cooperate in the bringing of such an action; her refusal was based on the fact that the father of her youngest child is disabled and is not able to support the child. Furthermore, she had been required by the Department of Social Services to file a paternity suit against the father of her first three children. That filing had lead to constant strife between her and the respondent. She does not wish to duplicate that situation with the father of her youngest child.

IX

FIRST CAUSE OF ACTION

The Court in its initial decision in this case found New York State Social Services Regulation 369.2(f) (3) (ii) (e) invalid for presenting a condition of eligibility not provided by the Social Security Act. The new statute (New York Social Services Law 101-a(2) (3)) suffers from the same vice. By requiring a mother to cooperate in naming, locating and prosecuting a putative or non-supporting father,

New York has again set up a condition of eligibility not provided for by the Social Security Act. As indicated by the decisions of the United States Supreme Court in *Townsend v. Swank*, 404 U.S. 282, 92 S.Ct. 502 (1971); *Meyers v. Juras*, 404 U.S. 803 (1971) reh. den. 404 U.S. 961; *Carleson v. Taylor*, 404 U.S. 803 (1971); *Weaver v. Doe*, 404 U.S. 987 (1971); Department of Health, Education and Welfare regulations (45 C.F.R. 235.70) and proposed rule (Information Memorandum AO-IM-73-14 Dec. 19, 1972) as well as the decisions of numerous federal courts in addition to this Court, a NOLEO requirement which is a condition of eligibility conflicts with the Social Security Act and cannot stand.

> a) The appropriate law enforcement officials will be notified in writing promptly as soon as Aid to Dependent Children has been furnished in respect to a child who is believed to have been deserted or abandoned by a parent. *This requirement has no effect upon the determination of eligibility.* It is a requirement upon the agency, and is fulfilled by providing the . . . information after a family has been found eligible and been granted assistance . . . (emphasis supplied) 45 C.F.R. Section 235.70

New York's NOLEO statute (Social Services Law 101-a (2) (3)) is being used by the Onondaga County Department of Social Services to require an applicant or recipient for Aid to Dependent Children to file a petition of paternity or non-support against the father as a condition of eligibility for a mother's receipt of Aid to Dependent Children. The United States Supreme Court in affirming the decisions of three-judge courts in Oregon and California has determined similar NOLEO provisions to be invalid as setting

up an additional requirement of eligibility not called for by the Social Security Act. *Meyers v. Juras, supra, Carleson v. Taylor, supra, Weaver v. Doe, supra.* Three affirmances make it clear that an applicant for public assistance may not be required to file a petition of non-support. Further, under these decisions an applicant cannot be compelled to cooperate in providing information about the absent parent as a condition of eligibility.

On its face and as applied by the Onondaga County Department of Social Services, the New York NOLEO provision is invalid as establishing an additional eligibility requirement not provided for by the Social Security Act.

PLAINTIFFS' SECOND CAUSE OF ACTION

Defendants' action in erecting an additional requirement of eligibility constitutes a denial of equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that it creates an invidious and unjustifiable distinction. New York's action in this case requires that impoverished mothers institute and cooperate in proceedings against their children's fathers; no such requirement is imposed on the well-to-do. Marriages of the well-to-do are not driven asunder by forcing one spouse to prosecute another. Classifications based on wealth have long been recognized as peculiarly obnoxious to the principles of equality enshrined in the Fourteenth Amendment.

In this action under 42 U.S.C. Section 1983, no exhaustion of state remedies is required: no adequate remedy at law is available to plaintiffs. Administrative Fair Hearings held by the State Department of Social Services provide no remedy because State Fair Hearing officers are not empowered to declare state statutes illegal.

X

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully pray on behalf of themselves and all others similarly situated that this Court:

1. Assume jurisdiction of this cause and convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 and the remand order of the Supreme Court.

2. Issue a Temporary Restraining Order and preliminary injunction pursuant to 28 U.S.C. § 2284, ordering the defendants to reinstate the plaintiff Anna Stuck and all other similarly situated members of the plaintiff's class to assistance to which they are entitled, meeting the requirements for a reasonable subsistence compatible with decency and health, and require continued assistance to plaintiff's class should any member withdraw a petition of paternity or non-support which she had previously filed.

3. Enter a final judgment pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Procedure declaring that the New York practices herein described in requiring plaintiffs to cooperate in naming, locating and prosecuting putative or non-supporting fathers of their children conflict with the Social Security Act of 1935, 42 U.S.C. § 602, and the regulations promulgated thereunder by the Department of Health, Education and Welfare, and deny the plaintiffs and the class they represent due process and the equal protection of the laws guaranteed them by the Fourteenth Amendment to the United States Constitution.

4. Issue a permanent injunction restraining the defendants, their successors, agents and employees from terminating or denying public assistance to plaintiffs and the class they represent where such terminations or denials conflict with the Social Security Act of 1935, or deny equal protection of the laws in the manner described above.

5. Award the plaintiffs and the class they represent damages consisting of the public assistance to which they are entitled, but for the illegal and unconstitutional termination of benefits.

6. Award the plaintiffs their costs and disbursements incurred herein.

7. Award the plaintiffs reasonable attorney's fees.

8. Award the plaintiffs and all others similarly situated such further and alternative relief as may seem just and equitable.

Dated: March 5, 1973.

ONLS,
DOUGLAS A. ELDRIDGE,
ONONDAGA NEIGHBORHOOD LEGAL SERVICES,

By: DOUGLAS A. ELDRIDGE, *of Counsel,*
Attorneys for the Plaintiffs,
633 South Warren Street,
Syracuse, New York 13202.
Telephone: (315) 475-3127.

(Verification omitted in printing.)

Plaintiffs' Exhibit 1, Filed May 2, 1973

STATE OF NEW YORK

DEPARTMENT OF SOCIAL WELFARE

In the Matter of the Appeal
of
ANNA STUCK

From a Determination by the Onondaga County Department of Social Services relating to the adequacy of a grant of aid to dependent children.

Date of Hearing: 3/1/73.

Place of Hearing:

Before: William R. Meyers, *Hearing Officer.*

Reported By: Charles F. DeZolt, *Hearing Reporter.*

Appearances:

Appellant:

Anna Stuck.
Douglas Eldridge, Esq.

Onondaga County Department of Social Services:

James Hughes, Esq.—Agency Attorney.
Mrs. Ruth Isaacs—Senior Caseworker Fair Hearings.

Plaintiffs' Exhibit 1, Filed May 2, 1973.

The Hearing Officer: My name is William R. Meyers, I am the hearing officer designated by the State Commissioner of Social Services to conduct this fair hearing on behalf of one Anna Stuck; from an adverse determination by the agency, with specific reference to the adequacy of a grant of aid to dependent children; as respect the computation of the appellant's budget and the removal of her needs therefrom.

There will be a verbatim transcript kept of the record of this proceeding. The hearing will be conducted in the following manner: Both parties will be permitted present documentary evidence, and witnesses, who may be questioned and cross examined. And, if I deem it appropriate, there may be rebuttal. As a result of this hearing there will be a decision issued by the State Commissioner which will be binding on both parties and copies of which decision will be given both parties.

This involves a specific determination of the agency; therefore, I would ask that Mr. Hughes present the agency's case first.

Mr. Hughes: Thank you, Mr. Meyers. At this time, Mr. Meyers I would like to present a recertification form in the matter of the appellant, Anna Stuck, form number DSS 1229. This document is signed by Anna Stuck, January 17, 1973. The signature is contained on the second page and I hand a copy to the appellant.

Mr. Eldridge: Thank you.

The Hearing Officer: Any objection, Mr. Eldridge?

Mr. Eldridge: No objections.

The Hearing Officer: Miss Stuck was this your application for recertification? This is the one that you have in front of you?

Plaintiffs' Exhibit 1, Filed May 2, 1973.

Miss Stuck: This should have Mr. Cummins (phonetic) name down here, I think.

Mr. Eldridge: That is an attorney which; which is not at issue at this point.

The Hearing Officer: Is that your signature on the reverse? On the back?

Miss Stuck: Yes.

The Hearing Officer: Okay, the application of the appellant, the face and reverse thereof, signed by her and dated January 17, 1973 are received in evidence. As one document. Marked Agency's Exhibit A. Proceed.

Mr. Hughes: At this time, Mr. Meyers I would like to introduce the recertification outline. This outline is dated February 2, 1973. It consists of four copy pages. The second and fourth page being the reversed side of the recertification outline. This document is signed by one A. Peters, of the agency on 2/5/73. It was—it was made in the regular course of business of the agency and maintained in the case record of the agency, on Anna Stuck; and I hand a copy to the appellant.

Mr. Eldridge: Thank you.

The Hearing Officer: As a case entry being made by the agency, as part of the agency's case record, the four pages of the recertification outline I received in evidence; as one document, marked Agency's Exhibit B. Proceed.

Mr. Hughes: At this time, Mr. Meyers, I would like to present a notice of intent to reduce public assistance. The document is addressed to Anna Stuck; it is dated February 5, 1973, it indicates that Miss Stuck's assistance will be reduced effective 3/20—or 2/20/73; and it is signed by Mr. T. Lynch of the agency; and it was prepared in the regular course of business with the agency and mailed in the

regular course of business; and maintained in the case record of the agency.

Miss Stuck: I got a letter in the mail that said it was going to—

Mr. Hughes: That is what that says madam. Effective, 2/20/73, assistance is going to be reduced.

The Hearing Officer: This is the form that you received in the mail? This is a copy of the one that you have in front of you?

Miss Stuck: I get $245. That looks like an eight, to me. Right here. That don't look right, there.

The Hearing Officer: Well, that was the form that you received?

Miss Stuck: When they cut it down to $245, yes.

The Hearing Officer: Presumably, this was the basis for your request for the fair hearing.

Miss Stuck: That is right.

The Hearing Officer: Then, the notice of intent to reduce assistance, addressed to the appellant, and dated February 5, 1973, is received in evidence. Marked Agency Exhibit C. Proceed.

Mr. Hughes: I would like to call Mrs. Isaacs, at this time, Mr. Meyers.

The Hearing Officer: Well, just a moment. Mr. Eldridge, am I correct in assuming that the computation of the budget, as such, is not in issue; but rather the fact with regard to the removal of Miss Stuck's needs from the budget?

Mr. Eldridge: Yes, I believe, *Re* computation would be required contingent upon the decision of the Commissioner today.

The Hearing Officer: Okay.

Plaintiffs' Exhibit 1, Filed May 2, 1973.
R. Isaacs, for Appellee, Direct.

EXAMINATION OF MRS. ISAACS

By Mr. Hughes:

Q. Mrs. Isaacs, you had an opportunity to review this file prior to the hearing? A. Yes.

Q. And, are you aware of what occurred to precipitate the action, the action that took place on 2/5/73? A. Yes.

Q. Could you please explain the action of the agency and the reason therefore? A. The agency has removed Anna Stuck from the case. They continue to give assistance to the children. The main reason being, that Miss Stuck refuses to give the agency information so that they may file paternity on the youngest child.

Q. And, the youngest child's name is who? A. Susan Stuck, I believe.

Q. And, does the agency have any information with regard to the alledged putative father of Susan Stuck? A. I believe—on the father of the child she has given the name of the town.

Q. Who is the putative, alledged putative father? Do you know? A. David Campbell.

Q. And, as contained on the recertification form. Is that correct? A. Yes.

Q. Did the agency have any discussion with Miss Stuck regarding the whereabouts of Mr. Campbell? Mrs. Isaacs, does the record indicate that—I will withdraw that question. Does the record indicate anywhere, that Anna Stuck has given us information sufficient for the, for the agency to file a paternity action? A. No, there is not enough information for us to file.

Q. And that was the reason that Miss Stuck was removed from the case. Is that correct? A. That is correct.

Mr. Hughes: I have no further questions of Mrs. Isaacs, Mr. Meyers.

The Hearing Officer: Did Miss Stuck tell you whereabouts of Mr. Campbell?

Mrs. Isaacs: When she made out the recertification, she did give the name of an area. I believe, it is Wellsville.—In New York State. However, we don't have his Social Security Number, address, or any other information that we could use to file.

The Hearing Officer: Did she indicate any place of employment?

Mrs. Isaacs: No, she did not.

The Hearing Officer: She indicate anything with regard to the contact, or lack of contact with Mr. Campbell, that would assist the agency in ascertaining his whereabouts?

Mrs. Isaacs: No, she did not.

The Hearing Officer: What led you to believe that the client was possessed of such information?—At this time?

A. She did know that—she did give us the township, Wellsville, New York; and she has said she did not want to file paternity. And she did not want to give us any further information.

The Hearing Officer: In other words, this was a declaration on her part, that she did not want to assist you in these proceedings?

Mrs. Isaacs: I believe so.

The Hearing Officer: Well, when you say, "you believe", were you present?

Mrs. Isaacs: I was not present at the original discussion, no.

The Hearing Officer: Well then, how did you become possessed of this?

Mrs. Isaacs: We have the information in the case file; and we have spoken to the person who handled the case, which is what we do when we are working on a fair hearing.

Miss Stuck: She only had the case about two days.

The Hearing Officer: Anything further, Mr. Hughes?

Mr. Hughes: Yes, I do.

EXAMINATION OF MRS. ISAACS

By Mr. Hughes:

Q. Mrs. Isaacs, would you look at the third page of Exhibit B, please? Do you have the third page of Exhibit B before you? A. Yes.

Mr. Eldridge: Excuse me, which is the third page?

Mr. Hughes: It is marked page 17.

Q. You note there paragraph C in that exhibit? You note it? A. Yes.

Q. Does that indicate any comment or give any information regarding David Campbell and Miss Stuck and her refusal to assist the agency in filing a paternity action? A. It notes the fact that paternity has not been established, no paternity has been established and client said at the interview that she did not want paternity to be filed at this time.

Plaintiffs' Exhibit 1, Filed May 2, 1973.
R. Isaacs, for Appellee, Cross.

Q. I show you the last page of that exhibit, the fourth paragraph of that exhibit. Is there any indication there with regard to the paternity of Susan Stuck and the activity of Anna Stuck with regard to the filing of the paternity action? A. Yes.

Q. Would you indicate the entry that is made there? A. Mother has made Susan Stuck—"Mother has made no progress in straightening out this matter. She is being removed from case for failure to comply."

Q. What is this matter that is indicated? A. This concerns the paternity of Susan Stuck.

Mr. Hughes: I have no further questions, Mr. Meyers.

The Hearing Officer: Mr. Eldridge?

Mr. Eldridge: Yes, if I may ask Mrs. Isaacs a couple of questions.

EXAMINATION OF MRS. ISAACS

By Mr. Eldridge:

Q. Mrs. Isaacs, there has been testimony that Anna Stuck gave the name and location of Susan Stuck's putative father. What more information is required of Mrs. Stuck before you would continue her grant?

Mr. Hughes: I object to the question as being self serving. He is assuming that all the address has been given. I submit the documents speak for themselves and the testimony has been elicited. If he wishes to question with regard to her testimony, fine. But, he is asking for a conclusion.

Plaintiffs' Exhibit 1, Filed May 2, 1973.
R. Isaacs, for Appellee, Cross.

Mr. Eldridge: She is being terminated for failure to cooperate. I think the question is, what is indeed "cooperation"?

The Hearing Officer: I think the question would merit a response. We are not strictly bound by the rules of evidence, Mr. Hughes.

A. As I understand your question, Mr. Eldridge, what information—information would be required? Is that what you are asking me?

Q. How does she have to cooperate more than she has done, so as not to be terminated? A. This is the name of a town which would not necessarily be enough to find someone. We need an address where he is living and where he works; and then, of course, we would file; and if necessary, she would have to go into court and then she would have to go along on that to.

Q. An address and name is what you say is cooperation? A. Yes.

Q. Noting paragraph C in Agency's Exhibit B, third page, which you read before, there seems to be two different hands. Can you tell me who wrote which?—And when? A. Well, the signature, the original record was written by the worker, A. Peters; and dated 2/5/73. Then this—

Q. Paragraph C, you were referring to? A. Everything on this page down to where it says "signature worker" A. Peters, date, 2/5/73. Then below that, it has to be approved. It has to be, go before the workers immediate supervisor who is a T. Lynch; and he also signed it 2/5/73.

Q. Now, I'm referring to paragraph C, you read along there, there is some things crossed out and a new hand-

writing appears. Can you tell me whose handwriting is which? A. Well, I am not a handwriting expert, Mr. Eldridge.

Q. Well, you do have some familiarity with the people in the agency. Do you not? A. Yes, and I would say that where it says, "she did not want paternity"; and then what you are talking about is, "to be filed at that time".

Q. And yes, initially Ann said, she did not want to file paternity at this time. Is that right? And then that was crossed out. A. Paternity, at this time.

Q. And then— A. He changed the wording, this looks like—

Q. He being, Mr. Lynch? A. It looks like Mr. Lynch's writing, to me.

The Hearing Officer: Mr. Eldridge, would you concede the language there, "did not want to file paternity" and "not want paternity to be filed", is basically—

Mr. Eldridge: No. Anna Stuck "did not want the paternity to be filed", that apparently was filled out by Mr. Lynch after the interview.

The Hearing Officer: Is this the—is this the nub of the whole thing?

Mr. Eldridge: That is one issue which is confused.

The Hearing Officer: Off the record.

(A discussion was held off the record.)

The Hearing Officer: Back on the record.

Mr. Eldridge: That is all I have. Thank you, Mrs. Isaacs.

Plaintiffs' Exhibit 1, Filed May 2, 1973.

The Hearing Officer: Do you have any other witnesses, Mr. Hughes?

Mr. Hughes: I have no further witnesses, Mr. Meyers.

The Hearing Officer: Mr. Eldridge, you are at bat.

Mr. Eldridge: Mr. Meyers, I think the nub of the question here is whether the department can require cooperation in a paternity proceeding as a condition of eligibility for a mother in a ADC grant. I submit to you the U.S. Supreme Court decided three times; Meyers vs. Juras, Doe V. Swank, and Taylor V. Martin. That such a requirement as a condition of eligibility violated the Social Security Act and intent of Congress in passing that act. Federal Regulation 45 CFR 235.70, states the Department of Health, Education and Welfare views any NOLEO requirement, such as this, may not be used as a condition of eligibility. Decision of three judge court—

The Hearing Officer: Mr. Eldridge, you are not pursuading a jury.

Mr. Eldridge: I think it is necessary for only two more citations.

The Hearing Officer: If you desire to place something of this nature in the record, as a position of law, certainly you should file a brief of law.

Mr. Eldridge: I think it would be unnecessary, if you allow me to—Shirley V. Lavine, decision of three judge court of Northern District, New York. June 7, 1972, declaring Onondaga County Department of Social Services utilization as a condition of

eligibility of NOLEO requirement is illegal; and in a matter of Lewis V. Lavine, in the Southern District Court of New York State. In the fall of 1972, a preliminary injunction was granted. Restraining the enforcement of the regulations of which the department relies on today. I would like now to ask Mrs. Stuck a few questions.

EXAMINATION OF MISS STUCK

By Mr. Eldridge:

Q. Miss Stuck, will you please state your full name, A. Anna Dora Stuck.

Q. Mrs. Stuck, will you tell us why you do not wish to bring paternity suit? A. One, is because of what took place before.

Q. What was that that took place before? A. The one Warren suit was not brought on the welfare department. They did not bring the paternity suit on it. It was through the probation department that brought this suit.

Q. Were you required to bring the paternity action on the three oldest children? A. Not by the welfare department, no.

Q. What happened as a result of your filing that action against Warren? A. This happened, well, it takes away a person—almost all of their living.

Q. You mean Warren's living? A. Yes, almost all of it.

Q. How did Warren react to you, finally? A. He brought this to my face all the time. And of course, I work some of the time. Because I worked in Sixty-nine and Seventy.

Q. Did you feel it caused dissention between you and Warren?

Mr. Hughes: I object, in regard to the relationship between her and Warren Davison. It is irrelevant and immaterial.

The Hearing Officer: Is the expressed reason for—she had for not desiring, for her not initiating paternity proceedings with respect to her youngest child, I would think she already expressed her view.

Eldridge: Does the record reflect she felt it a source of dissension between Warren and herself?

The Hearing Officer: She has expressed it.

Q. Do you feel your relationship with David would be similarly hurt. A. Yes, I do. We talked this over ahead of time.

Q. Do you believe David is able to support your youngest child? A. No, no.

Q. Is David disabled? A. Yes, he is.

Mr. Eldridge: That is all I have.

The Hearing Officer: Mr. Hughes?

EXAMINATION OF MISS STUCK

By Mr. Hughes:

Q. Miss Stuck is it your position that you do not want the Commissioner of the Department of Social Services, County of Onondaga, to file a paternity action with regard to your child, Miss Stuck? A. No.

Q. You do not want us to file. Is that correct? A. No.

Q. If the agency filed one, would you cooperate with the agency in prosecuting that paternity action? A. I would not sign the papers.

Plaintiffs' Exhibit 1, Filed May 2, 1973.
A. Stuck, for Appellant, Re-direct.

Q. Would you go to court and testify if you were required? A. That he was the father?

Q. Yes. A. But, no signing papers.

Q. But, you would go to court, if we ask you to go to court? A. To determine he is the father? Yes.

Q. To determine and take the stand to testify that he is the father. A. No.

Mr. Hughes: I ask that the witness not be coached.

The Hearing Officer: I think she should answer for herself.

A. At this time, I would not.

Q. And, you know the whereabouts of David Campbell at this time? A. Only his writing address.

Q. And you have not given the agency full information with regard to where he is located. Is that right? A. I don't know the number. No, because I have never been there.

Mr. Hughes: I have no further questions, Mr Meyers.

Mr. Eldridge: Mr. Meyers, I would like to clarify one point.

EXAMINATION OF MISS STUCK

By Mr. Eldridge:

Q. You say you do know the mailing address? A. But, I don't know the number. I did before he moved.

The Hearing Officer: Okay?

Mr. Eldridge: May we just clarify one point.

Plaintiffs' Exhibit 1, Filed May 2, 1973.
A. Stuck, for Appellant, Re-direct.

Q. Miss Stuck, if the department began an action, themselves, without requiring you to bring the action and the court ordered you to appear, requiring you by law to appear, under penalty of going to jail for not appearing, would you appear then? —Or not? A. I would appear for all locations of the father; but no signing papers.

Mr. Eldridge: Thank you. We rest.

Mr. Hughes: I have one further question of Miss Stuck. You realize, that if you are ordered to appear by the court, you must take the stand and indicate when you conceived Susan; and what the relationship between you and David was. Are you willing to testify on that matter?

Miss Stuck: I don't think this was the issue. It is on the grounds of paternity and the money that was being reduced.

Mr. Hughes: Mr. Meyers, I have no further questions.

The Hearing Officer: Okay.

Mr. Hughes: I do have a statement I would like to make for the record.

The Hearing Officer: Just a moment. Miss Stuck, you have indicated at one point that you are adverse to initiate any paternity proceedings against David Campbell on your own.

Miss Stuck: No, I did not, I told the workers that I would not sign paternity.

The Hearing Officer: Yes, you didn't want to start the paternity proceedings against David Campbell, yourself.

Miss Stuck: No.

The Hearing Officer: Is that correct?

Miss Stuck: Right.

The Hearing Officer: All right. Now, you have also indicated today that you do not desire that Onondaga County do so.

Miss Stuck: No, because of the further business with Warren. This is my reason.

The Hearing Officer: That is your fixed position. You not only don't want Onondaga County to start the action; but you don't want to start one on your own.

Mr. Eldridge: Mr. Hearing Examiner, her want has no bearing on the Department's ability to file that action, as you well know.

The Hearing Officer: It is her intent, Mr. Eldridge. The case is closed.

Mr. Hughes: Mr. Meyer, I would like to make a brief statement for the record. I would like to address myself to some of these citations made by Mr. Eldridge.

The Hearing Officer: With respect to the same point that I made with regard to Mr. Eldridge, I would point out that if either of you desire something in the nature of case citations be spread on the record, this may be done in the form of a brief at law. —Which should be filed. This is a hearing that is designed for the purpose of developing facts and not for the purpose of developing legal opinions. As such, if either of you desire that such citations be considered, you may ask at this point that the case

decision be deferred pending receipt of appropriate citations at law.

Mr. Hughes: In that event, Mr. Meyers, I have no further statement for the record.

The Hearing Officer: Then, the case is closed and there will be a decision from Albany.

Certified to be a true and correct transcript of the minutes taken at this fair hearing.

CHARLES F. DEZOLT,
Hearing Reporter.

Exhibits Received at Fair Hearing.
Decision After Fair Hearing.
Answer to Amended Complaint on Behalf of State Defendant.

Exhibits Received at Fair Hearing

The "Recertification Outline", the "Notice of Intent to Reduce Public Assistance" and the "Certification of Need for Public Assistance" are printed as attachments to the Answer to the Amended Complaint on Behalf of the State Defendant as is the "Agency Summary."

Decision After Fair Hearing

The Decision After Fair Hearing dated March 7, 1973 is printed as an attachment to the Answer to the Amended complaint on Behalf of the State Defendant.

Answer to Amended Complaint on Behalf of State Defendant

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing.)

Defendant Abe Lavine, individually and as Commissioner of the Department of Social Services of the State of New York, by Louis J. Lefkowitz, Attorney General of the State of New York, for his answer to the amended complaint herein and without prejudice to his opposition to the Court's order of April 9, 1973:

Answer to Amended Complaint on Behalf of State Defendant.

1. Denies each and every allegation contained in Part "I" (Preliminary Statement) of the amended complaint.

2. Denies each and every allegation contained in Part "II" (Nature of Action) of the amended complaint.

3. Denies each and every allegation contained in Part "III" (Jurisdiction) of the amended complaint.

4. Denies each and every allegation contained in Part "IV" (Three Judge Court) of the amended complaint.

5. Denies each and every allegation contained in Part "V" (Plaintiffs) of the amended complaint upon the grounds that defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity thereof, except admits upon information and belief that Anna Stuck has a family household consisting of herself and four minor children aged two, eight, nine and twelve years, and that she receives a public assistance grant on behalf of said minor children.

6. Denies each and every allegation contained in Part "VI" (Class Action) of the amended complaint.

7. Admits the allegations of Part "VII" (Defendants) of the amended complaint, and affirmatively alleges that defendant Lavine is responsible for the administration of the AFDC program statewide and that the responsibilities of defendant Lascaris are local only and subject to the supervision of Defendant Lavine.

8. Denies each and every allegation contained in Part "VIII" (Statement of Claim) of the amended complaint except:

Answer to Amended Complaint on Behalf of State Defendant.

(a) Admits upon information and belief that Anna Stuck has been receiving public assistance for her four infant children.

(b) Admits that Anna Stuck applied to the Onondaga County Department of Social Services for recertification for public assistance, and that she did so on January 17, 1973.

(c) Affirmatively alleges that on or about March 1, 1973 a fair hearing was held with regard to the adequacy of the grant of Aid to Dependent Children to said Anna Stuck. Attached hereto and made a part hereof is a copy of fair hearing decision dated March 7, 1973, and copies of Exhibits "A", "B" and "C" admitted thereat, together with a copy of the summary for fair hearing prepared by the Onondaga County Department of Social Services dated February 23, 1973. Said fair hearing decision of March 7, 1973 recited as follows:

"Appellant refused to disclose the location of the putative father of her youngest child. Appellant conceded at the fair hearing that she knew the mailing address of the putative father and had declined and still refused to disclose it. She had told the agency his name and the community where he presumably resided.

"The record establishes that appellant had declared that she would not initiate paternity proceedings and desired that the agency not do so. Based upon the degree of cooperation received from appellant as to other information about the putative father, the agency properly found appellant's lack of cooperation to be a basis for termination of her assistance."

(d) That defendant Lavine's affirmance of the agency action was based on the recipient's lack of cooperation, not her failure to institute a proceeding. Defendant affirmatively alleges that under the provisions of New York Social Services Law, § 101-a(2) (3) the grant of assistance to a parent or caretaker relative may be discontinued only as provided therein and cannot be discontinued for failure to "institute" a paternity or non-support proceeding. Attached is Administrative Letter dated November 6, 1972, 72PWD-174. The Administrative Letter provides that pending promulgation of regulations implementing Social Services Law, § 101-a, local districts are directed to act in accordance with instructions contained in the Administrative Letter.

9. Denies each and every allegation contained in Part "IX" (Plaintiffs' First Cause of Action, Plaintiffs' Second Cause of Action) of the amended complaint.

10. Denies each and every allegation, argument and conclusion of the amended complaint not herein admitted, controverted or specifically denied.

FIRST AFFIRMATIVE DEFENSE:

11. As to the plaintiffs named in the original complaint, the amended complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE:

12. As to the intervening plaintiff Anna Stuck, the amended complaint fails to state a claim upon which relief can be granted.

Answer to Amended Complaint on Behalf of State Defendant.

THIRD AFFIRMATIVE DEFENSE:

13. The Court lacks jurisdiction of the subject matter in that:

(a) The Court lacks jurisdiction under 28 U.S.C. § 1343 in that the amended complaint fails to present a substantial constitutional question, and by reason thereof, this Court lacks jurisdiction to determine any pendent statutory question;

(b) The Court lacks jurisdiction under 28 U.S.C. § 1331 in that plaintiffs have not satisfied the requirements thereof;

(c) The Court lacks jurisdiction in that the cause of action has become moot as matter of law by reason of the mandate of the Supreme Court of the United States and plaintiffs' failure to comply therewith.

FOURTH AFFIRMATIVE DEFENSE:

14. The Court lacks jurisdiction to award damages as prayed for in the amended complaint against defendant.

FIFTH AFFIRMATIVE DEFENSE:

15. The plaintiffs lack standing to maintain this action and lack capacity to sue

SIXTH AFFIRMATIVE DEFENSE:

16. There is no actual case or controversy before the Court; there is no justiciable controversy before the Court.

Answer to Amended Complaint on Behalf of State Defendant.

SEVENTH AFFIRMATIVE DEFENSE:

DEFENDANT ALLEGES, UPON INFORMATION AND BELIEF:

17. That New York Social Services Law, § 353 provides for an administrative appeal to the State Department of Social Services from the action or failure to act of a local social services official, and for a fair hearing thereon.

18. That intervening plaintiff Anna Stuck has received a fair hearing and "Decision After Fair Hearing" dated March 7, 1973 is annexed hereto and made a part hereof.

19. That plaintiffs Shirley, Anderson and Doe (B.H.) have not applied pursuant to section 353 of the New York Social Services Law for an administrative appeal arising out of circumstances connected with this case according to Departmental records.

20. That the plaintiffs, other than the intervening plaintiff Anna Stuck, have failed to exhaust administrative remedies. Said plaintiffs and intervening plaintiff have failed to exhaust State judicial remedies.

EIGHTH AFFIRMATIVE DEFENSE:

21. New York Social Services Law, § 101-a(2) (3) is valid and constitutional.

WHEREFORE defendant Lavine prays that this Court:

(a) Deny the injunctive, declaratory and other relief sought by the plaintiffs;

(b) Dismiss the amended complaint and the action or, in the alternative, declare that New York Social Services Law § 101-a(2) (3) is valid and constitutional;

(c) That defendant Lavine have such other, further and different relief as to the Court may seem just and proper, together with costs and disbursements.

ALAN W. RUBENSTEIN,
Principal Attorney, *of Counsel*,

LOUIS J. LEFKOWITZ,
Attorney General of the State of New York,
Attorney for Defendant Lavine,
The Capitol,
Albany, New York 12224,
Telephone: (518) 474-7178.

(Verification Omitted in Printing.)

Administrative Letter No. 72 PWD-174, Dated November 6, 1972, From Deputy Commissioner Russo to Commissioners of Social Services—Attached to Answer

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES
1450 Western Avenue
Albany, New York 12203

ABE LAVINE
Commissioner

ADMINISTRATIVE LETTER

Transmittal No.: 72 PWD-174

Date: November 6, 1972

To: Commissioners of Social Services

Subject: Implementation of 1972 Legislation Pertaining to Location of Deserting Parents and Fathers of Children Born Out of Wedlock

Distribution: B-4 All Child Welfare Staff
B-6 All Public Assistance Staff

Chapter 687 of the Laws of 1972, effective September 1, 1972, amends Social Services Law Sections 372-a and 101-a. The revisions require that additional items of information be included in the referral to the Department's Bureau of Registry and Location and also require, rather than permit, Social Services officials to file petitions for support from deserting parents and the fathers of children born out of wedlock when the applicant or recipient of assistance has failed to file such a petition. In addition, the revisions to the Social Services Law Section 372-a now provide a statutory mandate for current Department Regulations requiring Social Services officials to make full

Administrative Letter No. 72 PWD-174, Dated November 6, 1972, From Deputy Commissioner Russo to Commissioners of Social Services, Attached to Answer.

use of the Bureau of Registry and Location for the location of fathers of children born out of wedlock as well as other deserting parents when the children of such parents are recipients of or likely to become in need of such assistance.

In making a referral to the Bureau of Registry and Location all the following information, when available, must be reported on Form DSS-1176 (Formerly RL-109a). New York City centers will continue to use Form DSS-1039 for this purpose.

(a) The full and true name of each such parent together with any known aliases and last known address;

(b) his date and place of birth;

(c) his physical description;

(d) his social security number;

(e) his employment history;

(f) his military record;

(g) any police record; [and]

(h) whether a proceeding has been instituted against such parent or father to enforce the laws respecting the desertion, abandonment and support of such children and the time when such proceeding was instituted.

(i) whether a proceeding has been instituted in this or any other state pursuant to the provisions of the uniform support of dependents law; (If applicable,

Administrative Letter No. 72 PWD-174, Dated November 6, 1972, From Deputy Commissioner Russo to Commissioners of Social Services, Attached to Answer.

include in "Absent Parent—Marital History" section of Form DSS-1176 and "Court Record" section of Form DSS-1039) and

(j) any further information that may be of assistance in locating him (Use separate sheet for this purpose).

The amendments to Section 101-a require that commissioners *shall* institute proceedings under the appropriate provisions of the Family Court Act to obtain support or contributions to support such children in the event an applicant or recipient of public assistance fails to do so.

The procedures required to implement the intent of legislation are as follows:

1. In each appropriate ADC case, all information concerning the whereabouts of a deserting parent or parent of a child born out of wedlock shall be investigated immediately; and
   (a) If the whereabouts of the deserting parent or parent of a child born out of wedlock are known, a petition for support shall be filed by the applicant or Commissioner within fifteen days after the case is opened.
   (b) If the whereabouts of the deserting parent or parent of a child born out of wedlock are unknown, immediate notice shall be given to the law enforcement official in accordance of Section 352 of the Social Services Law, and referral made to the Department Bureau of Registry and Location. (Bulletin 168)

Administrative Letter No. 72 PWD-174, Dated November 6, 1972, From Deputy Commissioner Russo to Commissioners of Social Services, Attached to Answer.

NOTE: Parts 1 (a) and (b) do not supersede the 90 day Waiver related to the birth of an out of wedlock child. When a waiver of investigation is filed in accordance with Department Regulation 351.2e(2), no action need be instituted. Action should be instituted at the end of the 90 day period if appropriate.

2. When current (within 60 days) information is obtained as to the whereabouts of the deserting parent or parent of a child born out of wedlock, the following action shall be taken:

(a) A fifteen day notice of discontinuance of assistance pursuant to 358.9 of Department Regulations shall go to the client routinely, if the information supplied places the deserting parent or parent of a child born out of wedlock in the home of the client. The case is presumed to be ineligible since the deserting parent is alleged to be in the home of the recipient.

(b) A petition for support shall be filed by the client or commissioner within 15 days if the information received places the deserting parent or parent of a child born out of wedlock outside of the home.

(c) Pertinent information shall be forwarded to the Probation Department, for appropriate action, within 15 days if a support order is already in existence, but in default or arrears.

Administrative Letter No. 72 PWD-174, Dated November 6, 1972, From Deputy Commissioner Russo to Commissioners of Social Services, Attached to Answer.

3. When the information concerning the whereabouts of the deserting parent or parent of a child born out of wedlock is more than sixty days old and the local Desertion and Support Unit shall investigate the leads obtained within 15 days in order to determine the current address of the absent parent. If the address is verified, a petition for support shall be filed immediately by the client or Commissioner.

NOTE: Filing of a petition includes proceedings pursuant to the Uniform Support of Dependents Law.

4. Agencies will be required to report on the use of information received from the Bureau of Registry and Location within 30 days of receipt of information. Appropriate forms for this purpose will follow.

5. When facts and evidence related to possible fraud are ascertained, action should be taken in accordance with Bulletin 169.

The Department will promulgate regulations to implement the amendments to Sections 372-a and 101-a. Pending these changes, local social services districts are to act in accordance with instructions contained in this administrative letter.

SOLOMON B. RUSSO
Deputy Commissioner

Decision After Fair Hearing, Dated March 7, 1973, in the Matter of the Appeal of Anna Stuck— Attached to Answer

STATE OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

In the Matter
of
The Appeal of ANNA STUCK

From a determination by the Onondaga County Department of Social Services (hereinafter called the agency).

A fair hearing was held at 333 East Washington Street, Syracuse, New York, on March 1, 1973, before William R. Meyers, Hearing Officer, at which appellant, appellant's representative and representatives of the agency appeared. The appeal is from a determination by the agency relating to the adequacy of a grant of aid to dependent children, in that the agency determined to reduce appellant's regularly recurring grant. An opportunity to be heard having been accorded all interested parties and the evidence having been taken and due deliberation having been had, it is hereby found:

(1) Appellant, aged 35, has a family household consisting of herself and her four minor children, aged 2, 8, 9 and 12 years.

(2) Appellant, a recipient of public assistance for sometime past, applied for recertification for public assistance on January 17, 1973.

(3) Appellant declared to an agency employee at the time of such reapplication that she did not want paternity proceedings to be commenced against the putative father of her youngest child.

(4) The agency inquired as to the whereabouts of the putative father, his employment and other facts known to appellant which she refused to disclose to agency personnel.

(5) The agency determined to remove appellant's needs from the regularly recurring grant for her lack of cooperation.

(6) The agency sent a Notice of Intent to Discontinue appellant's grant on February 5, 1973, to be effective February 20, 1973. The appellant requested a fair hearing to review the agency's proposed action on February 8, 1973. The agency was not notified by the State Department of Social Services that appellant's grant must be continued without change until a fair hearing decision is issued.

The agency should have been notified by the State Department of Social Services to continue appellant's grant unchanged pending the fair hearing decision as required by Section 358.8 of the Regulations of the State Department of Social Services. Therefore, the agency now must restore appellant's grant in full retroactively from the date of reduction to the date of this decision.

Subdivision (c) of Section 351.2 of the Regulations provides in paragraph (2) (i) thereof that there shall be reviewed with the applicant the whereabouts of close relatives, and their ability and willingness to assist.

Decision After Fair Hearing, Dated March 7, 1973, In the Matter of the Appeal of Anna Stuck, Attached to Answer.

Appellant refused to disclose the location of the putative father of her youngest child. Appellant conceded at the fair hearing that she knew the mailing address of the putative father and had declined and still refused to disclose it. She had told the agency his name and the community where he presumably resided.

The record establishes that appellant had declared that she would not initiate paternity proceedings and desired that the agency not do so. Based upon the degree of cooperation received from appellant as to other information about the putative father, the agency properly found appellant's lack of cooperation to be a basis for termination of her assistance.

The agency has continued assistance for the other members of appellant's household.

DECISION: The determination of the agency is affirmed. However, the agency is directed to take appropriate action in accordance with the foregoing decision and the agency is directed further to report to the Syracuse Office of the fair hearing section on its action taken pursuant to this decision in accordance with the provisions of Section 358.22 of the Regulations of the State Department of Social Services.

Dated: Albany, New York.
Mar 7 1973.

ABE LAVINE,
Commissioner,

By CARMEN SHANG,
Assistant Commissioner.

Agency Summary re: Anna Stuck, Dated February 23, 1973—Attached to Answer

(Onondaga County Seal)
COUNTY OF ONONDAGA
DEPARTMENT OF SOCIAL SERVICES
County Office Building
Syracuse, N. Y. 13202

John L. Lascaris
Commissioner

February 23, 1973

Mr. William Carr
Office of Counsel
New York State
Department of Social Services
1450 Western Avenue
Albany, New York

Re: Anna Stuck
400 Wyoming Street
03-83243

Dear Mr. Carr:

The agency presents the following summary in response to the appellant's request for a Fair Hearing dated 2/6/73 based on discontinuance.

Appellant's family composition consists of herself, birth date 7/24/37, and her four children, Rose Davison, birth date 7/15/60, Warren Davison, birth date 3/5/63, Lawrence Davison, birth date 1/8/65 and Susan Stuck, birth date 4/26/70.

On 2/5/73 appellant was sent a letter informing her that her assistance would be reduced effective 2/20/73 for failure to comply.

Agency Summary re: Anna Stuck, Dated February 23, 1973, Attached to Answer.

Appellant has been removed from the grant effective 2/20/73 since she refused to comply in establishing paternity on her youngest child, Susan Stuck. When appellant came in for her recertification on or about 2/2/73 she was questioned about the paternity of her youngest child. The putative father is a Mr. David Campbell but paternity has never been established and appellant was not willing to give any further information about Mr. Campbell. She stated she did not want paternity to be filed at this time. Therefore, appellant's assistance was discontinued in accordance with N.Y.S. Code Rules and Regulations Sec. 351.2 (c)(2)(vi)(vii).

Assistance is being continued to appellant's children and the budget is computed as follows:

Pre-Add	(4/5 of $256.00)	$204.80
Rent	(4/5 of $101.00)	80.80
Total Needs		$285.60

Paternity has been established on appellant's other three children.

Very truly yours,

ONONDAGA COUNTY,
Department of Social Services,
JOHN L. LASCARIS, *Commissioner.*

(Mrs.) MARY G. CROSSLEY, *C.S.W.*,
Fair Hearing Supervisor Grade A.

(Mrs.) Pamela J. Testone,
Case Worker.

PJT:cld

"Recertification Outline"—Attached to Answer.

RECERTIFICATION OUTLINE

Date of Recert Jan. 1, 1973 Recert Period Jan. 1973
Mom Seen [illegible]
Living Arrangements
Rooms LR DR K No. of BR 2 Total No. of Rms 5 House Flat
Co-op Case Name [illegible]
Case Number — No. of People —
Living with MR Family: Name Nathan family No. of People —
Relationship [illegible]
Current Employment Date Started — Clock No. —
Name of Employer Client not currently employed
Address \
Dates & Amounts of Last four pays (Gross) \

Year to Date Total \ Date of Check \
If unemployed, dates of last employment Oct. Nov. March '72
Last Employer [illegible]
Address [illegible]
Reason for Leaving pregnancy

Recertified Peggy Ervin 3/1/73

Employability
In Work Reform? Yes No In Work Relief? Yes No
In MIN? Yes No
If not, identify program, state reason(s) Client is on exempt (education) as she will be pregnant. Cert by [illegible]

Work Related Benefits (UID, WYSDH, Workmen's Comp., Soc. Sec. etc)
Type \ Date Started \ Amount \
How Verified Client discussed (file, verbal) [illegible]
Other Any prev. eligibility for any type of unemployment benefit

Eligibility for Vets Benefits? Yes No
If no, explain
Name of Vet [illegible]
Date of Last VB-1 Requested 2/13/73 Amt of Benefit —
VB-1 - for unemployability information

BEST COPY AVAILABLE

Family Case ... as early and periodic screening information ...
offered to client? Yes ... No ...
Did client wish to participate ... No ...
If yes, det. scr unin trans total form filed ...

For continuation of comments started on front side:

Resources (Refer to DSS-1229, Section H):
List Type of Resource, how Verified, and Disposition:

Client owned Property: Yes__ No__ 2nd Mtge Taken? Yes__ No__
Is Verification (Resource Green Sheet) in Record? Yes__ No__
Date Property Info Referred to Resource Div.__

Support for Dependent Children

A. Father	Children	Status
1.		
2.		
3.		

B. Current Court Order

Father	Start Date	Amt	Period	Date Last Paymt	Yer.
1.					
2.					
3.					

C. If no Current Court Order, Explain:

D. Deserting Parent:

Father	1176 Filed?	Date of Filing
1.		
2.		

Reason for Category:

Signature of Worker A. Peters Date 2/5/73
Pending__ Approved ✓ Approved-Pending__ Disapproved__
Supervisor Signature [illegible] Date 2/5/73
Supervisory Comments:

Approved, owing as from your last allowance from Cass

BEST COPY AVAILABLE

This case was first given publicity
Thro' Press many months ago in the
case of the children. This week
at Hunstanton Family Circle
That they were getting all right
at the time. Since gone to Hunstanton
& removing etc. made it Mrs Steele as
followed in their progress. The three
eldest children attacks Diphtheria. Died
Doctor Ford on going daily
depot called in to her treatment & necessary
steam operation
Christ Church that Mrs Harrison's
factory the three children stays with her
earth mother when he comes from Middlesex
to visit the children. She states as under from her
X The is no dispute over Chrysostom
of Susan Shield & mother Rat under
age proved is strangulation and this matter
also is being removed from case for further
Inquiry.
Mrs Steele volunteered for the
W.C. program & is looking for a job
It is unlikely that the family could
know self support

"Notice of Intent to Reduce Public Assistance"—Attached to Answer.

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES
600 South State Street
Syracuse, New York 13202

Received in mail Agency 2/1/73

NOTICE OF INTENT TO REDUCE PUBLIC ASSISTANCE

Name of Recipient: Anna Wash

Zone: 2

Address: 400 Wyoming St.
Syracuse, N.Y. 13204

Category and Case: 03-83243

Date: 2/3/73

This is to advise you that this department intends to reduce your public assistance grant from $237.00 to $203.60 effective 2/28/73 for the following reason(s):

Failure to comply.
See enclosed budget worksheet.

You may have a conference at this department to review your case at any time before the proposed date of reduction of your grant.

Please telephone Supervisor, Mr. T. Lynch at 477-7737 for an appointment.

T. Lynch
(Signed)

2/3/73
(Date)

Mr. T. Lynch

RIGHT TO FAIR HEARING

If you believe that your assistance should not be reduced, you may request a state fair hearing by telephoning 474-5951, Ext. 516 or by writing to Fair Hearing Section, New York State Department of Social Services, 1450 Western Avenue, Albany, New York 12203. If you request a fair hearing, a notice will be sent to you informing you of the time and place of your hearing. At the hearing, you, your attorney or other representative will have an opportunity to present relevant written and oral evidence to demonstrate why your assistance should not be reduced as well as an opportunity to question any persons who appear at the hearing and present evidence against you. If you request a fair hearing before the date your assistance is proposed to be reduced, you will continue to receive your assistance unchanged until the fair hearing decision is issued. Community legal services are available to you at Onondaga Neighborhood Legal Services, Inc., 633 South Warren Street, Syracuse, New York 13202 and Frank H. Hiscock Legal Aid Society, 433 South Warren Street, Syracuse, New York 13202.

BEST COPY AVAILABLE

FORM DSS-1229 (REV. 2/71)

CERTIFICATION OF NEED FOR PUBLIC ASSISTANCE

STATE OF NEW YORK — DEPARTMENT OF SOCIAL SERVICES

EXP. 2 REV. ☐ NEW ☒ RECERT

SOCIAL SERVICES DISTRICT: Onondaga County

CASE NO.: 03-83243

A. I, (PRINT YOUR NAME) Anna Adora Stuck CERTIFY THAT

I NEED PUBLIC ASSISTANCE FOR (CHECK ONE BOX) ☐ MYSELF ☒ MYSELF AND MY FAMILY,

BECAUSE: ☐ I (WE) HAVE NO INCOME FROM ANY SOURCE

(CHECK ONE BOX) ☐ MY (OUR) INCOME AND RESOURCES ARE NOT ENOUGH TO MEET MY (OUR) LIVING NEEDS.

I HAVE SHOWN THE AMOUNT OF MY (OUR) INCOME AND RESOURCES ON THE OTHER SIDE.

I (WE) LIVE AT: No. 400 Wyoming St STREET 1st APT. NO. FLOOR Syracuse CITY N.Y. 13204 ZIP CODE

I WAS BORN ON: MONTH 7 DAY 14 YEAR 97

I CAN BE REACHED BY CALLING: TELEPHONE NUMBER —

MY MAIDEN NAME IS: (IF MARRIED WOMAN) Not married —

B. SOCIAL SECURITY INFORMATION

1. MY NUMBER IS 087-36-108

MY SPOUSE'S NO. IS —

2. I ☐ AM ☒ AM NOT RECEIVING SOCIAL SECURITY BENEFITS AT THIS TIME

3. I ☐ AM ☒ AM NOT ENROLLED IN MEDICARE (IF YOU ARE ENROLLED, WHICH PART(S)? ☐ PART A ☐ PART B

4. MY SOC. SEC. OR MEDICARE CLAIM NO IS:

C. THE FOLLOWING PEOPLE ARE IN MY FAMILY, NEED PUBLIC ASSISTANCE AND ARE INCLUDED IN THIS APPLICATION

FULL NAME	RELATIONSHIP TO ME	MALE / FEMALE	DATE OF BIRTH	MARRIED OR SINGLE
SELF Anna Adora Stuck	self	F	7/14/97	S
SPOUSE NONE				
Rose Marie	daughter	F	11/15/60	S
Steven Lawrence Jr	son	M	2/17/63	S
Lawrence Steven	son	M	12/16/65	S

FULL NAME	RELATIONSHIP TO ME	MALE / FEMALE	DATE OF BIRTH	MAR
Susan Stuck	daughter	F	11/26/70	S

Rose Marie Lawrence Steven Jr Lawrence Steven

D. THE FOLLOWING CHILDREN WHO ARE LISTED ABOVE HAVE ONE OR BOTH PARENTS LIVING ELSEWHERE

NAME OF CHILD	NAME AND ADDRESS OF PARENT WHO LIVES ELSEWHERE		SUPPORT PAID (CHECK ONE)	SOCIAL SECURITY NO. OF NAMED
Rose Marie	Woodrow Davison	Williamsville, N.Y. paternity established	☒ YES ☐ NO	not known
Steven Lawrence Jr	"	" paternity established	☒ YES ☐ NO	not known
Lawrence Steven	"	" paternity established	☒ YES ☐ NO	not known
Susan Stuck	Wanda Campbell	Skaneateles, N.Y.	☐ YES ☒ NO	not known

E. THE FOLLOWING PEOPLE LIVE WITH ME AND ARE NOT INCLUDED IN THIS APPLICATION

FULL NAME	RELATIONSHIP TO ME	MALE / FEMALE	AGE, IF RELATIVE	SELF-SUPPORTING (YES OR NO)	ALREADY RECEIVING PUBLIC ASSISTANCE: YES	NO	CATEGORY	CASE NUMBER	MONTHLY GRANT
No other live with this family									

F. THE FOLLOWING PEOPLE WHO DO NOT LIVE WITH ME ARE THE LEGAL SPOUSES OF MYSELF AND OF OTHER INDIVIDUALS INCLUDED IN THIS APPLICATION

PERSON IN HOUSEHOLD WHO IS MARRIED	NAME AND ADDRESS OF LEGAL SPOUSE	MONTHLY AMOUNT OF SUPPORT PAID	SOCIAL SECURITY NO. OF SPOUSE
No one is married - Anna Adora Stuck [illegible]			

"Certification of Need for Public Assistance"—Attached to Answer.

128

BEST COPY AVAILABLE

129

6. (CHECK ONE BOX) ☐ OWN MY HOME ☒ PAY RENT FOR HOUSING ☐ HAVE NO HOUSING EXPENSES

I OWN MY HOME AND HAVE THE FOLLOWING EXPENSES:

1. THERE IS A MORTGAGE ON MY HOME ☐ YES ☐ NO
   MY MONTHLY MORTGAGE PAYMENT IS $_____ THIS PAYMENT INCLUDES: ☐ TAXES ☐ INSURANCE
   THE NAME AND ADDRESS OF MORTGAGE HOLDER IS: _____
2. THE YEARLY EXPENSES FOR MY HOME ARE: PROPERTY TAXES $_____ FIRE INSURANCE $_____
   WATER $_____ OTHER (SPECIFY)_____ $_____
3. PART OF MY HOME IS: ☐ RENTED ☐ NOT RENTED (SPECIFY) _____ $_____

I RENT MY HOME AND HAVE THE FOLLOWING EXP.:

1. MY MONTHLY RENT IS $ 120.00
2. MY LANDLORD SUPPLIES THE FOLLOWING: ☐ HEAT ☐ GAS ☒ ELECTRICITY ☐ FURNITURE Refrigerator, Stove
3. MY MEALS ☐ ARE ☒ ARE NOT INCLUDED IN MY RENT
4. I BUY THE FOLLOWING MEALS IN A RESTAURANT ☐ BREAKFAST ☐ LUNCH ☐ DINNER Ceramics Supplies
5. MY LANDLORD'S NAME AND ADDRESS IS: NAME Syracuse Housing ADDRESS _____

H. IDENTIFIED BELOW ARE THE INCOME AND RESOURCES IN MY HOUSEHOLD

INCOME

TYPE	CHECK EITHER YES OR NO	AMOUNT	NAME OF PERSON HAVING INCOME
SALARY AND WAGES - GROSS (WEEKLY)	☐ YES ☒ NO	IF "YES" REQUEST AND COMPLETE WAGE INCOME SUPPLEMENT FORM	
UNEMPLOYMENT INS. (WEEKLY)	☐ YES ☒ NO		
WORKMEN'S COMPENSATION (WEEKLY)	☐ YES ☒ NO		
N.Y. STATE DISABILITY INS. (WEEKLY)	☐ YES ☒ NO		
VETERAN'S BENEFITS (MONTHLY)	☐ YES ☒ NO		
SOCIAL SECURITY (MONTHLY)	☐ YES ☒ NO		
CONTRIBUTIONS FROM RELATIVES (MONTHLY)	☐ YES ☒ NO		
COURT ORDER PAYMENTS (MONTHLY)	☒ YES ☐ NO	15.43	
OTHER INCOME (WRITE TYPE) _____	☐ YES ☒ NO		

RESOURCES

TYPE	CHECK EITHER YES OR NO	AMOUNT OR VALUE	NAME OF PERSON OWNING RESOURCE
BANK ACCOUNTS	☐ YES ☒ NO		
STOCKS AND BONDS	☐ YES ☒ NO		
LIFE INSURANCE (FACE VALUE)	☐ YES ☒ NO		
REAL ESTATE EXCLUDING OWN HOME	☐ YES ☒ NO		
OTHER RESOURCES (incl. cash) (WRITE TYPE) _____	☐ YES ☒ NO		
MEDICAL INSURANCE Family	☒ YES ☐ NO	NAME OF COMPANY:	

I ☐ AM ☒ AM NOT INVOLVED IN A LEGAL ACTION WHICH MAY RESULT IN A MONEY AWARD

THE NAME AND ADDRESS OF MY ATTORNEY IS: Mitchell, Greenberg, Hiscock & Green

J. I (WE) ☐ HAVE ☒ HAVE NOT MOVED WITHIN THE PAST 12 MONTHS
THE ADDRESS WHERE I LIVED BEFORE IS: Syracuse, N.Y.

THE FOLLOWING UNEMPLOYED MEMBERS OF MY FAMILY ☐ HAVE ☒ HAVE NOT REGISTERED FOR UNEMPLOYMENT INSURANCE BENEFITS.
not eligible

THE FIRST CHECK IS EXPECTED _____ (?)

K. IN PREPARING THIS APPLICATION I HAD HELP FROM (SIGNATURE) X A. Peters
WHO WORKS AT Onondaga County Dept. of Social Services, 100 S. State Street - Dept of _____, BUT I UNDERSTAND AND APPROVE ALL STATEMENTS.

L. I hereby certify that the information given on this application is true and correct. I agree to inform the agency promptly, of any change in my needs, income, property, living arrangements or address. I further certify that I am now receiving public assistance and that I have not given any of my property to anyone to get public assistance. I acknowledge that this is a legal document and that untrue statements are subject me to legal action for fraud.

SIGNED Virginia Stuck
DATE SIGNED Jan 17, 1973

IF SIGNED WITH AN X
SIGNATURE OF WITNESS X _____
ADDRESS OF WITNESS _____

APPLICANT LEAVE BLANK

DISPOSITION:
☒ ELIGIBLE 285.00 AMOUNT Dep PER
☐ WITHDRAWN
☐ INELIGIBLE, REASON ADC - Absence of parent-Unemployed
WORKER'S SIGNATURE X A. Peters
DATE SIGNED 2/5/73

Answer to Amended Complaint on Behalf of County Defendant

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing.)

Defendant John L. Lascaris of the Department of Social Services of the County of Onondaga, by his Attorney John L. LaParo, Acting Welfare Attorney, James H. Hughes, Assistant Welfare Attorney, of counsel, for his answer to the amended complaint herein, without prejudice to his opposition to the courts order of April 9, 1973:

1. Denies each and every allegation contained in Part "I" (Preliminary Statement); Part "II" (Nature of Action); Part "III" (Jurisdiction); Part "IV" (Class Action); Part "IX" (First Cause of Action and Plaintiffs Second Cause of Action); of the amended complaint.

2. Denies each and every allegation contained in Part "V" (Plaintiffs) of the amended complaint upon the grounds that defendant lacks sufficient knowledge or information to form a belief as to the truth or falsity thereof, except admits that Anna Stuck has a family household consisting of herself and four minor children ages 12, 9, 8, 2½, years, that she presently resides with her children at 400 Wyoming Street, Syracuse, N.Y., and that she receives a public assistance grant on behalf of said minor children.

3. Admits the allegations of Part "VII" (Defendants) of the amended complaint, and affirmatively alleges that defendant Lascaris is responsible for the administration of the welfare laws and policies of the State of New York as they effect the County of Onondaga, and is further subject to the supervision of defendant Lavine.

Answer to Amended Complaint on Behalf of County Defendant.

4. Denies each and every allegation contained in Part "VIII" (Statement of Claim) of the amended complaint, except:

(a) Admits that Anna Stuck has been receiving public assistance for her four infant children.

(b) Admits that Anna Stuck applied to the Onondaga County Department of Social Services for recertification for Public Assistance, and that she did so on January 17, 1973.

(c) Affirmatively alleges that on or about March 1, 1973 a Fair Hearing was held with regard to the adequacy of the grant of Aid to Dependent Children to said Anna Stuck. On March 7, 1973, the defendant Lavine issued a Fair Hearing decision recited as follows:

"Appellant refused to disclose the location of the putative father of her youngest child. Appellant conceded at the Fair Hearing that she knew the mailing address of the putative father and had declined and still refused to disclose it. She had told the agency his name and the community where he presumably resided."

"The record establishes that appellant had declared that she would not initiate paternity proceedings and desired that the agency not do so. Based upon the degree of cooperation received from appellant as to other information about the putative father, the agency properly found appellant's lack of cooperation t be a basis for termination of her assistance."

(d) That pursuant to the foregoing Fair Hearing decision, defendant Lascaris continued assistance to the four minor children of the family of Anna Stuck and continued to deny assistance to Anna Stuck.

5. Denies each and every allegation, argument, and conclusion of the amended complaint not herein admitted, controverted, or specifically denied.

FIRST AFFIRMATIVE DEFENSE:

6. As to the plaintiffs named in the original complaint, the amended complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE:

7. As to the intervening plaintiff Anna Stuck, the amended complaint fails to state a claim upon which relief can be granted.

THIRD AFFIRMATIVE DEFENSE:

8. The Court lacks jurisdiction of the subject matter in that:

(a) The Court lacks jurisdiction under 28 U.S.C. Sec. 1343 in that the amended complaint fails to present a substantial constitutional question, and by reason thereof, this Court lacks jurisdiction to determine any pendent statutory question;

(b) The Court lacks jurisdiction under 28 U.S.C. Sec. 1331 in that plaintiffs have not satisfied the requirements thereof;

(c) The Court lacks jurisdiction in that the cause of action has become moot as matter of law by reason of the mandate of the Supreme Court of the United States and plaintiffs' failure to comply therewith.

FOURTH AFFIRMATIVE DEFENSE:

9. The Court lacks jurisdiction to award damages as prayed for in the amended complaint against defendant.

FIFTH AFFIRMATIVE DEFENSE:

10. The plaintiffs lack standing to maintain this action and lack capacity to sue.

SIXTH AFFIRMATIVE DEFENSE:

11. There is no actual case or controversy before the Court; there is no justiciable controversy before the Court.

SEVENTH AFFIRMATIVE DEFENSE:

DEFENDANT ALLEGES, UPON INFORMATION AND BELIEF:

12. That New York Social Services Law, Sec. 353 provides for an administrative appeal to the State Department of Social Services from the action or failure to act of a local Social Services official, and for a Fair Hearing thereon.

13. That intervening plaintiff Anna Stuck has received a Fair Hearing and "Decision After Fair Hearing" dated March 7, 1973.

Answer to Amended Complaint on Behalf of County Defendant.

14. That plaintiffs Shirley, Anderson, and Doe (B.H.) have not applied pursuant to Section 353 of the New York Social Services Law for an administrative appeal arising out of circumstances connected with this case.

15. That the plaintiffs, other than the intervening plaintiff Anna Stuck, have failed to exhaust administrative remedies. Said plaintiffs and intervening plaintiffs have failed to exhaust State judicial remedies.

EIGHTH AFFIRMATIVE DEFENSES:

16. New York Social Services Law, Sec. 101-A(2) (3) is valid and constitutional.

WHEREFORE defendant Lascaris prays that this Court:

(a) Deny the injunctive, declaratory and other relief sought by the plaintiffs;

(b) Dismiss the amended complaint and the action or, in the alternative, declare that New York Social Services Law, Sec. 101-a(2) (3) is valid and constitutional;

(c) That defendant Lascaris have such other, further and different relief as to the Court may seem just and proper, together with costs and disbursements.

JAMES H. HUGHES,
Assistant Welfare Attorney,
Of Counsel.

JOHN L. LaPARO,
Assistant Welfare Attorney,
State of New York,
Attorney for Defendant Lascaris.
Office and P. O. Address,
600 S. State Street,
Syracuse, New York 13202,
Telephone: (315) 477-7125.

Memorandum-Decision and Order of the Court

(Printed in full in Appendices to the Jurisdictional Statements of the State and County Appellants.)

Notice of Appeal of County Appellant

Nov 2 1973

Solicitor General
Docket Clerk
ed

Mr. Rubenstein
U. S. District Court
N. D. of N. Y.
Filed
Oct 31 1973
At ..... O'Clock ..... M.
J. R. Scully, Clerk
Utica

Received
Nov 2 1973
Department of Law
Albany Office

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing.)

Notice is hereby given that defendant John Lascaris, Individually and as Commissioner of the Department of Social Services of the County of Onondaga, hereby appeals to the Supreme Court of the United States from the final order entered in this action on September 26, 1973, as amended on October 4, 1973, granting plaintiff, Anna Stuck summary judgment declaring that New York Social Serv-

ices Law, § 101-a is unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility for AFDC and permanently enjoining defendants from denying or terminating AFDC assistance to plaintiff Anna Stuck or her minor children for failure to cooperate in obtaining support from an absent parent of her children, and defendant, John Lascaris appeals from each and every part of that order.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: Syracuse, New York, October 26, 1973.

PHILIP C. PINSKY,
Chief Welfare Attorney,
Attorney for Defendant, John Lascaris,
Onondaga County Dept. of Social Services,
600 South State Street,
Syracuse, New York 13202 (315) 477-7125.

Entered in Docket
Nov 2 1973

Affidavit of Service by Mail

State of New York, }
County of Onondaga. } ss.:

CELIA SKANDALIS, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides in the City of Syracuse, County of Onondaga, New York. That on the 29th day of October, deponent served the within Notice of Appeal upon Douglas A. Eldridge, Esq., Attorney for Plaintiffs in the within action, at Onondaga Neighborhood Legal Services, Inc., 633 South Warren Street, Syracuse, New York; and also upon Alan W. Rubenstein, Principal Attorney, c/o the Attorney General's office, attorney for defendant, Abe Lavine, at the Department of Law, The Capitol, Albany, New York; those being the addresses designated by said attorneys for that purpose, by depositing true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

CELIA SKANDALIS.

Sworn to before me this
29th day of October, 1973.
Philip C. Pinsky,
Notary Public.

Notice of Appeal of State Appellant

U. S. District Court
N. D. of N. Y.
Filed
Nov 14 1973
At ..... O'Clock .....M.
J. R. Scully, Clerk
Utica

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF NEW YORK

(Title Omitted in Printing.)

Notice is hereby given that defendant Abe Lavine, individually and as Commissioner of the Department of Social Services of the State of New York, hereby appeals to the Supreme Court of the United States from the final order entered in this action on September 26, 1973, as amended on October 4, 1973, which (1) denied summary judgment to defendants and granted summary judgment in favor of the plaintiff Anna Stuck against defendants declaring section 101-a, as amended, of the New York Social Services Law void, unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility for AFDC, and (2) permanently enjoined defendants from denying or terminating AFDC assistance to plaintiff Anna Stuck for failure to cooperate in obtaining support from an absent parent of her children, and defendant Lavine appeals from each and every part of that order except that no appeal is taken from those parts of that order which (a) permanently enjoined defendants

from denying or terminating AFDC assistance to the minor children of Anna Stuck as provided in that order; (b) denied "class action status"; and (c) denied "plaintiff's demand for retroactive payment of the amounts wrongfully withheld from her."

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: Albany, New York, November 13, 1973.

LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York,

By ALAN W. RUBENSTEIN,
Principal Attorney,
Attorney for Defendant Lavine,
Department of Law,
The Capitol,
Albany, New York 12224,
Telephone: (518) 474-7178.

To:

Honorable J. R. Scully, Clerk,
United States District Court for
the Northern District of New York,
Federal Building,
Utica, New York 13503.

Douglas A. Eldridge, Esq.,
Attorney for Plaintiffs,
Onondaga Neighborhood Legal Services, Inc.,
633 South Warren Street,
Syracuse, New York 13202.

Philip C. Pinsky, Esq.,
Chief Welfare Attorney,
Attorney for Defendant Lascaris,
Onondaga County Department
of Social Services,
600 South State Street,
Syracuse, New York 13202.

John B. LaParo, Esq.,
Welfare Attorney,
Attorney for Defendant Lascaris,
Onondaga County Department
of Social Services,
600 South State Street,
Syracuse, New York 13202.

State of New York,)
County of Albany.) ss.:

ALAN W. RUBENSTEIN, being duly sworn, deposes and says:

That I am a Principal Attorney in the office of the Attorney General of the State of New York, attorney for the defendant Lavine herein, and am a member of the Bar of this Court. I am not a party to this action.

On the 13th day of November, 1973, I served the annexed Notice of Appeal to the Supreme Court of the United States upon each of the attorneys named below, by depositing a true copy thereof, properly enclosed in a sealed, first-class postpaid wrapper, in the letter box of the Capitol

Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Post Office Department, directed to each of the said attorneys at the addresses within the State respectively theretofore designated by them for that purpose, as follows:

Douglas A. Eldridge Esq.
Onondaga Neighborhood Legal Services, Inc.
633 South Warren Street
Syracuse, New York 13202

Philip C. Pinsky, Esq.
Chief Welfare Attorney
Onondaga County Department of Social Services
600 South State Street
Syracuse, New York 13202

John B. LaParo, Esq.
Welfare Attorney
Onondaga County Department of Social Services
600 South State Street
Syracuse, New York 13202

All parties required to be served have been served.

ALAN W. RUBENSTEIN.

Sworn to before me this
13th day of November, 1973.
Dennis Hurley,
Notary Public, State of New York.
Qualified in Albany County.
Commission expires March 30, 1975.

Letter Dated June 10, 1974.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 10, 1974

Mrs. Ruth Kessler Toch
Solicitor General of New York
Department of Law, The Capitol
Albany, New York 12224

RE: LASCARIS v. SHIRLEY, No. 73-1016;
LAVINE v. SHIRLEY, No. 73-1095

Dear Mrs. Toch:

The Court today took the following action in the above cases:

> "The motion of appellee Stuck for leave to proceed *in forma pauperis* is granted. In these cases probable jurisdiction is noted. The cases are consolidated and a total of one hour is allotted for oral argument."

Enclosed are memorandums describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

MICHAEL RODAK, JR., *Clerk*

By HELEN K. LOUGHRAN
(Mrs.) Helen K. Loughran
Assistant Clerk

AIR MAIL

Encls.

SUPREME COURT OF THE UNITED STATES

* *

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

and

Appellant

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellant

-vs-

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN, and on behalf of all others similarly situated; and

ANNA STUCK, Intervenor,

Appellees

* *

Docket No.
73-1095
73-1016

MOTION
FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

* *

Appellee ANNA STUCK asks leave to file the attached Motion to Affirm without pre-payment of costs and to proceed In Forma Pauperis pursuant to Rule 53.

The Appellee's Affidavit in support of this Motion is attached hereto.

Dated: January 24, 1974

Isadore Greenberg

ISADORE GREENBERG

Douglas A. Eldridge

DOUGLAS A. ELDRIDGE

ONONDAGA NEIGHBORHOOD LEGAL SERVICES, INC.
Attorneys for Appellees

633 South Warren Street
Syracuse, New York 13202
Telephone: (315)475-3127

SUPREME COURT OF THE UNITED STATES

* *

LAVINE, et al,

Appellants

-vs-

SHIRLEY, et al,

Appellees

* *

Docket No. 73-1095
73-1016

AFFIDAVIT

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS:
CITY OF SYRACUSE)

I, ANNA STUCK, being first duly sworn according to law, depose and say in support of my motion for leave to proceed without being required to pre-pay costs or fees:

1. I am the Appellee in the above entitled class action.

2. My four infant children and I are recipients of public assistance in the Aid for Dependent Children category.

3. Because of my poverty, I am unable to pay the costs of said cause.

4. I am unable to give security for the same.

5. I have been informed by my attorneys and believe myself that I am entitled to the redress sought in this action.

6. The nature of the case is briefly stated as follows:

I intervened in the instant action upon remand from this Court (409 U.S. 1052) which required the District Court to consider the validity of New York Social Services Law 101-a.

The Appellants had terminated my welfare payments on the

basis of N.Y.S.S.L. 101-a for my refusal to cooperate in non-support proceedings against the father of my youngest child.

The three-judge court determined that §101-a was invalid as was 18 N.Y.C.R.R. 369.2(f)(3)(ii)(e) which was the subject of Shirley v. Lavine when it was previously before this Court. The three-judge court additionally found the recently changed HEW Regulation 45 C.F.R. §233.90 did not compel a different result since the new regulation runs counter to the consistent construction placed on the Social Security Act by the Courts.

It is from the summary judgment declaring said regulation to be invalid and restraining the Department of Social Services from enforcing it that Appellants have appealed. Appellee brings this motion in order that she may be allowed to move for affirmance of the judgment below on the ground that the questions upon which this action depends are so unsubstantial as not to need further argument, and that the denial of retroactive payments below should be reversed, without pre-payment of costs or fees.

Anna Stuck
ANNA STUCK

Subscribed and sworn to
before me this 1st day
of January, 1974.

Douglas A. Eldridge

DOUGLAS A. ELDRIDGE
Notary Public in the State of New York
Onondaga County, [illegible]-5168918
My Commission Expires March 30, 19[illegible]

SUPREME COURT OF THE UNITED STATES

* *

LAVINE, et al, Appellants	*	Docket Nos. 73-1095, 73-1016
-vs-	*	
SHIRLEY, et al, Appellees	*	MOTION TO AFFIRM

* *

Appellee Anna Stuck moves the Court to affirm, on the merits, the judgment of the three-judge court for the Northern District of New York below on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Appellee further moves that the order of the three-judge court be modified to allow the award of welfare benefits to Appellee Anna Stuck for the period dating from her wrongful denial to the present.

ONONDAGA NEIGHBORHOOD LEGAL SERVICES, INC.
ISADORE GREENBERG, of Counsel
DOUGLAS A. ELDRIDGE, of Counsel
Attorneys for Appellees
633 South Warren Street
Syracuse, New York 13202
Telephone: (315)475-3127

TO: LOUIS J. LEFKOWITZ, ESQ.
Attorney General, State of New York
Albany, New York 12224

JOHN LA PARO, ESQ.
Chief Welfare Attorney
Onondaga County Department of Social Services
600 South State Street
Syracuse, New York 13202

SUPREME COURT OF THE UNITED STATES

* *

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellant

-vs-

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN, and on behalf of all others similarly situated; and

ANNA STUCK, Intervenor,

Appellees

* *

BRIEF
IN SUPPORT OF
MOTION TO AFFIRM

* *

Docket No. 73-1016
73-1095

ONONDAGA NEIGHBORHOOD LEGAL SERVICES
ISADORE GREENBERG, of Counsel
DOUGLAS A. ELDRIDGE, of Counsel

Attorneys for Appellees

633 South Warren Street
Syracuse, New York 13202
Telephone: (315)475-3127

INDEX

		Page
TABLE OF CITATIONS		ii
I.	The State Statute and the Federal Regulation Involved	1
II.	The Proceeding Below	2
III.	Argument	3
IV.	The New HEW Regulation is not a Legal Guidepost to be Followed by the Courts	6
V.	Retroactivity of Award to Appellee Anna Stuck	9

TABLE OF CITATIONS

CASES:	Page No.
Adams v. Parham, ___F.Supp.___, C.A. #16041 (N.D. Ga., April 14, 1972)	8
Barron v. Saucier, ___F.Supp.___, C.A. #17-159, decided September 27, 1973	8
Bermudez v. Butz, #73-5338, U.S. S.Ct.	9
Carleson v. Taylor, 404 U.S. 980 (1971)	3,4,5 8,10
Carr v. Saucier, ___F.Supp.___, C.A. #16-704 (N.D. Ga., March 29, 1973)	8
Carter v. Butz, #73-712, U.S. S.Ct.	9
Chee v. Graham, Civ. #70-532 Phx. WEC (D. Ariz. 1971)	4
Doe v. Carleson, unreported, N.D. Calif., July 18, 1972	8
Doe v. Ellis, 350 F.Supp. 375 (D. S.C. 1972)	4
Doe v. Gillman, 479 F. 2nd 646 (8th Cir. 1973), cert. filed October 23, 1973	4
Doe v. Harder, contempt, 310 F.Supp. 302 (D. Conn. 1970)	4,5,10
Doe v. Hodgson, (2nd Cir. May 1, 1973), cert. filed August 14, 1973, under name of Doe v. Brennan	5,10
Doe v. Lavine, 347 F.Supp. 357 (S.D. N.Y. 1972)	4
Doe v. Rampton, 366 F.Supp. 189, (D.C. Utah, 1973)	4
Doe v. Schmidt, 330 F.Supp. 159 (E.D. Wisc. 1971)	4
Doe v. Shapiro, 302 F.Supp. 761 (D.Conn. 1969), appeal dism'd 390 U.S. 488 (1970)	4
Doe v. Swoap, #71-864 RFP, N.D. Calif., October 26, 1973	8

Doe v. Wohlgemuth (T.R.O.) Civ. Act. #1958 (W.D. Pa. 1971) 4

Edelman v. Jordan, #72-1410, U.S. S.Ct. 9

Galindo v. Vowell, (consent j'ment) Civ. 5A-71-CA-248 (W.D. Tex. 1971) 4

Godfrey v. Stanton, (N.D. Indiana 1973) 4

Griggs v. Duke Power Company, 401 U.S. 424 (1971) 8

Juras v. Meyers, 404 U.S. 803 (1971), rehearing denied 404 U.S. 961 3,4,5,10

Lewis v. Lavine (order of Judge Breiant, 72 Civ. 4249, May 15, 1973) 3

Lewis v. Lavine, ___F.Supp.___, (S.D. N.Y. 1973) 4

Morningside Lenox Park v. Volpe, 334 F.Supp. 132 (N.D. Ga. 1971) 8

New York State Department of Social Services v. Dublino, ___U.S.___, 93 S.Ct. 2507, 2517 (1973) 7

Rothstein v. Wyman, 467 F. 2nd 226 (2nd Cir. 1972) cert. denied, 411 U.S. 921, rehearing denied 411 U.S. 988 (1973) 3

Saddler v. Winstead, 332 F.Supp. 130 (N.D. Miss. 1971) 4

Saiz v. Hernandez, 340 F.Supp. 165 (D. New Mex. 1972) 4

Story v. Roberts, ___F.Supp.___, (D.C. Fla. 1972) 4

Taylor v. Swoap, C. 69-666 RFP, N.D. Calif., filed October 26, 1973 8

Townsend v. Swank, 404 U.S. 281, 286, 92 S.Ct. 502, 505 (1971) 3,4,5

Weaver v. Doe, 404 U.S. 987 (1971) 3,5,10

Woods v. Miller, 318 F.Supp. 510 (W.D. Pa. 1970) 4

STATUTES:

State:

New York Social Services Law (1972 Laws of New York, Chapter 687 101-a as amended)	1,2,10

Federal:

Social Security Act, 42 U.S.C. §602	2
42 U.S.C. §602(a)(11)	6
42 U.S.C. §602(a)(17)(18)(22)	7
42 U.S.C. §602(a)(19)	7

REGULATIONS:

State:

New York Social Services Regulation 369.2(f)(3)(ii)(e)	1

Federal:

45 CFR 233.90(b)(4)	1,2

MISCELLANEOUS:

Supreme Court Rule 15(1)(c)	9
Oregon Executive Task Force Bulletin No. 9	4
Handbook of Public Assistance Administration, Part IV §8120	6
113 Congressional Record, 24043 (1967)	7

I

THE STATE STATUTE AND THE FEDERAL REGULATION INVOLVED

A. The State Statute

On remand from this Court the three-judge court was directed to examine its previous decision in the instant case in light of the passage of Chapter 687 of the 1972 Laws of New York (New York Social Services Law §101-a as amended). The three-judge court on remand found New York Social Services Law §101-a to be illegal, just as it had determined New York Social Services Regulation 369.2(f)(3)(ii)(e) to be when this case was first before it. The statute purported to require public assistance recipients to bring proceedings in court to compel apparently responsible relatives to provide support. Section 3 of the statute provides specifically that failure to cooperate in support or paternity proceedings will result in the non-eligibility of that recipient for further assistance or care.

B. The Federal Regulation

During the pendancy of the proceedings on remand, the United States Department of Health, Education and Welfare (HEW) announced a new NOLEO regulation, 45 CFR 233.90(b)(4). This regulation purported to draw a distinction between the termination of welfare assistance to a child and termination of assistance to the "uncooperative caretaker-relative". The regulation provided that assistance could not be terminated to the child but it could be terminated to the parent who refused to cooperate in

the filing of paternity or support actions. The court below found that this change in the federal regulations was without Congressional authority, that the new interpretation was in error, and that it should not be viewed as a guidepost to be followed judically.

II

THE PROCEEDING BELOW

As it had done when the case was initially before it, on remand the three-judge court chose to decide the matter on a statutory ground without reaching the constitutional issues raised. The court held that New York Social Services Law 101-a as amended was unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility for Aid to Families with Dependent Children (AFDC). It relied on the Social Security Act (42 U.S.C. §602 et seq.) in reaching this conclusion. It was not pursuaded to hold otherwise by the promulgation of HEW's regulation 45 CFR 233.90(b)(4) since that regulation appeared to be a diametric change from the NOLEO provisions which have existed since 1951, and since federal courts have repeatedly and consistently construed the NOLEO regulations to proclude their use as conditions of eligibility, and since any change from that stance would have to come from Congressional action rather than administrative fiat. Thus the court granted summary judgment in favor of Anna Stuck and against defendants Lavine and Lascaris. It denied a class action since it appeared that Anna Stuck herself

was the only New York welfare recipient who was not covered by the injunction in Lewis v. Lavine, pending in the Southern District of New York (order of Judge Breiant, 72 Civ. 4249, May 15, 1973). Further, the three-judge court denied payment to Anna Stuck of the amounts due to her in welfare benefits from the time she was wrongfully denied public assistance on the basis of the illegal statute. The court felt constrained by the views of the Second Circuit concerning retroactive payments expressed in Rothstein v. Wyman, 467 F. 2nd 226 (2nd Cir. 1972); cert. denied, 411 U.S. 921, rehearing denied 411 U.S. 988 (1973).

III

ARGUMENT

This case presents no questions which were not previously decided by this Court when it affirmed the three NOLEO cases during the 1971 term. Juras v. Meyers, 404 U.S. 803 (1971), rehearing denied 404 U.S. 961; Carleson v. Taylor, 404 U.S. 980, (1971); and Weaver v. Doe, 404 U.S. 987 (1971). In each of those cases the Court affirmed the decisions of the three-judge courts which held that state NOLEO provisions which conditioned eligibility for AFDC on a recipient's participation in a paternity or non-support suit against a responsible relative conflicted with the Social Security Act and were therefore void. These cases were bottomed on the principals set forth in Townsend v. Swank:

> (I)n the absence of Congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, the state eligibility

> standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. 404 U.S. 282, 286, 92 S.Ct. 502, 505 (1971).

In fifteen other cases, federal courts have upheld this principal.[1] New York State claims that a new wrinkle in her statute distinguishes it from the cases that have gone before and presents a substantial issue. The New York statute provides for the denial of public assistance to the mother but not to the child, if the mother fails to pursue the responsible relative. In Carleson v. Taylor, (supra) the NOLEO requirement was used as a condition of eligibility for both the child and the parent. In Juras v. Meyers, (supra), it is unclear as to whether both the child and the mother were terminated by the Oregon Executive Task Force Bulletin No. 9. It is plain, nonetheless, that at least the mother was terminated for her refusal to prosecute

---

1. Doe v. Shapiro, 302 F.Supp. 761 (D.Conn. 1969), appeal dism'd 390 U.S. 488 (1970); Doe v. Harder, contempt, 310 F.Supp. 302 (D. Conn. 1970); Woods v. Miller, 318 F.Supp. 510 (W.D. Pa. 1970); Doe v. Schmidt, 330 F.Supp. 159 (E.D. Wisc. 1971); Galindo v. Vowell, (consent j'ment), Civ. 5A-71-CA-248 (W.D. Tex. 1971); Doe v. Wohlgemuth, (T.R.O.) Civ. Act. No. 1958 (W.D. Pa. 1971); Saiz v. Hernandez, 340 F.Supp. 165 (D. New Mex., 1972); Saddler v. Winstead, 332 F.Supp. 130 (N.D. Miss. 1971); Chee v. Graham, Civ. 70-532 Phx. WEC (D.Ariz. 1971); Doe v. Lavine, 347 F.Supp. 357 (S.D. N.Y. 1972); Lewis v. Lavine, __F.Supp.__ (S.D. N.Y. 1973); Doe v. Ellis, 350 F.Supp. 375 (D. S.C. 1972); Story v. Roberts, __F.Supp.__, (D.C. Fla. 1972); Doe v. Rampton, 366 F. Supp.189, (D.C. Utah, 1973); Doe v. Gillman,479 F.2nd 646 8th Cir. 1973), cert. filed 10/23/73; Godfrey v. Stanton, (N.D. Indiana 1973).

non-supporting relatives. Weaver v. Doe, (supra) dealt with another combination. In that case only the child was denied public assistance when the mother refused to sue the father. New York's wrinkle in cutting the mother and not the child is simply another combination of the same illegal condition of eligibility. Of course termination of the mother results in a decrease of monies available for the needs of the children. Even if the mother is not included in the grant she must use some of the money allegedly restricted to the use of the children to keep herself alive so that she can care for the children. See Doe v. Harder, (supra). Plainly this new combination does not save the New York statute from its basic vice. Whether mothers and/or children are declared ineligible, the regulation sets up an additional eligibility requirement not provided for by the Social Security Act. The wrinkle does not present a substantial question not already decided by the Court; it is merely one of the combinations of eligibility conditions prohibited by the Court's affirmances of Juras v. Meyers, Carleson v. Taylor, and Weaver v. Doe. Since affirmances by the Court are afforded the same authority as decisions on the merits, the questions that the Appellants attempt to raise have already been decided. Doe v. Hodgson, (2nd Cir. May 1, 1973); cert. filed August 14, 1973, under name Doe v. Brennan.

IV

THE NEW HEW REGULATION IS NOT A LEGAL GUIDEPOST TO BE FOLLOWED BY THE COURTS

The NOLEO provision first appeared in 1951 when Congress enacted a law designed to secure child support from absent parents.[2] Immediately following the enactment of this provision, HEW promulgated its interpretive regulation:

> The NOLEO amendment does not make the assistance agency responsible for requiring the applicant to take action against the deserting parent or for making eligibility for assistance conditioned upon action by the applicant...The public assistance job is seen as that of providing eligible children with assistance they need; and it is not the intent of the legislation to deprive needy children of assistance in order to punish their parents for neglect of their duties. Although accepting assistance involves notice to the law enforcement officials if a parent has deserted or abandoned his child, the amendment does not impose an additional eligibility requirement...Handbook of Public Assistance Administration, Part IV, §8120.

Over the twenty years and more of the existence of the NOLEO requirement, HEW has consistently held to its position that NOLEO requirements were not to be used as conditions of eligibility. The abrupt departure from that position occurred last year when the appellants and others petitioned HEW to change the

---

2. The provision presently appears at 42 U.S.C. §602(a)(11).

regulation to allow the procedure as set forth in the New York statute. There had been no new expression of Congressional intent. On the contrary, in 1967 Congress amended the statute and added further NOLEO-related provisions (42 U.S.C. §602(a)(17), (18), and (22)). The legislative history of this amendment makes it clear that Congress continued to hold that the NOLEO requirement should not be an eligibility condition. (See statement of Wilbur Mills, Chairman, House Ways and Means Committee, author of the 1967 amendment 113 Cong. Rec. 23043(1967)). In 1968 Congress enacted the Work Incentive Program (42 U.S.C. §602(a)(19) and expressly provided penalties for an unjustified refusal to participate in the program. The intent of Congress was clear that participation in the work program was to be a condition of eligibility. The Court recognized this last term in its decision in New York State Department of Social Services v. Dublino, when it held that states could use work requirements as conditions of eligibility. (__U.S.__, 93 S.Ct. 2507, 2517,(1973)). The holding in Dublino is inapposite since the specific Congressional intent to use the work requirement as a condition of eligibility is not parallelled in the NOLEO area. Sixteen federal court decisions have held consistent with the Congressional intent. Additionally there have been the three United States Supreme Court affirmances. Notwithstanding the tremendous freight of these precedents, HEW changed the regulation.[3] The difficulty that HEW

---

3. The only change which appears to shed light on the reversal of HEW's stance on the NOLEO requirements was a change in staffing at the Social and Rehabilitation Service, the segment of HEW which was responsible for the promulgation of the new NOLEO (continued on p. 8)

has been having lately in interpreting its own regulations has been noted by the United States District Court for the Northern District of Georgia in the case of Barron v. Saucier, __F.Supp. __, Civ. Action #17-159, decided September 27, 1973:

> Furthermore, the defendants' position is not strengthened because HEW administrators have approved their procedure. Indeed, it is difficult to understand why HEW officials are unable to interpret their own regulations. This case is the third recent example of such ineptness. E.G., Adams v. Parham, __F.Supp.__, C.A. #16041 (N.D. Ga., April 14, 1972); Carr v. Saucier, __F.Supp.__, C.A. #16-704 (N.D. Ga., March 29, 1973).

Because of the apparent conflict between the plain meaning of the statutes and regulation and the HEW interpretation thereof, the agency interpretation normally given such administrative explications cannot be followed. Griggs v. Duke Power Company, 401 U.S. 424 (1971); Morningside Lenox Park v. Volpe, 334 F.Supp. 132, (N.D. Ga., 1971). Thus, in deviating from the usual practice of affording administrative regulations the status of convincing authority, the court below acted properly. The regu-

---

3. (Cont'd from p.7) regulation. At the time of the promulgation of the new regulation, Robert Carleson superintended the S.R.S. Carleson was the former Commissioner of Welfare for the State of California and was defendant in the NOLEO cases of Carleson v. Taylor, (supra) and Doe v. Carleson (unreported, N.D. Calif., July 18, 1972). The refusal of the State Department of Welfare to follow the directives of the Court in those two cases has resulted in contempt citations against the California State Welfare Department. Doe v. Swoap, #71-864 RFP, and Taylor v. Swoap, C. 69-666, RFP, N.D. Calif., filed October 26, 1973.

lation which deviated from the policies of twenty years standing, a policy which had been explicated and relied on by at least sixteen federal courts, was not convincing authority when done simply by administrative fiat. A change of this magnitude would only be warranted by the express intent of Congress.

V

RETROACTIVITY OF AWARD TO APPELLEE ANNA STUCK

A notice of appeal from the decision of the three-judge Court was filed in behalf of Anna Stuck in this matter. No separate jurisdictional statement was filed since such a statement would have simply reiterated the lengthy jurisdictional statement of each of the Appellants and since the question of retroactivity is "fairly comprised" within the questions set forth in the jurisdictional statements. Supreme Court Rule 15 (1)(c). The question of the validity of retroactive payments to welfare recipients is presently before the Court in the case of Edelman v. Jordan, #72-1410. The determination of the Court in that case should be dispositive of Miss Stuck's claim as well. The Court is referred to the excellent briefing by the Respondents and the amici setting out the arguments for retroactive grants. It should also be noted that the Court has already this term twice upheld the validity of retroactive payments in the welfare area. Carter v. Butz, #73-712, and Bermudez v. Butz, #73-5338.

Should the Court decide in Jordan that the question of retroactivity is to be determined on the facts of each case, it

should be pointed out that the recovery in the instant case would be very small. Since the matter is not a class action, recovery would be limited to the amount of the individual welfare allowance to Anna Stuck from the time that she was wrongfully denied public assistance February 20, 1973, until the time her assistance was reinstated pursuant to the order of the three-judge court October 1, 1973. Furthermore, the state has proceeded at its peril in enforcing New York Social Services Law 101-a as amended. The statute was passed during the pendancy of the litigation. Passage of the statute was secured through the efforts of the Department of Social Services. The Department was well aware that the case of Doe v. Harder, (supra) from its neighbor state of Connecticut, had held that the state's new wrinkle of terminating assistance to the mother instead of the child was a sham and suffered from the same vice as the previous method of terminating the mother and the child. At the time of the passage of the amendment, the Court had made the law in this area crystal clear in the affirmances of Juras v. Meyers, Carleson v. Taylor, and Weaver v. Doe. The state's knowledge of the infirmity of the statute is indicated by the fourth section of the bill, which states:

> The provisions of this act shall be ineffective to the extent they are determined to be not in compliance with federal law [and] regulations pertaining to public assistance and care.

The state should not be rewarded for its recalcitrant efforts to evade the law of the land. Doe v. Hodgson, (2nd Cir., May 1, 1973).

Therefore it is requested that the case be affirmed on the merits but that the order be modified to require payment of sums wrongfully withheld from Miss Stuck.

Respectfully submitted,

ONONDAGA NEIGHBORHOOD LEGAL SERVICES, INC.
ISADORE GREENBERG, of Counsel
DOUGLAS A. ELDRIDGE, of Counsel
Attorneys for Appellees
633 South Warren Street
Syracuse, New York 13202
Telephone: (315)475-3127

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF ONONDAGA) SS:
CITY OF SYRACUSE)

JEAN M. RICE, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age, and resides at 3130 Cold Springs Road, Baldwinsville, New York.

That on the 7th day of February, 1974, deponent served the within Motion for Leave to Proceed In Forma Pauperis, Motion to Affirm, and Brief in support of the Motion, upon Louis Lefkowitz, Attorney General of the State of New York, attorney for Appellant Lavine in this action, at the Capitol, Albany, New York 12224; and upon John LaParo, Esq., Chief Welfare Attorney, Department of Social Services, 600 South State Street, Syracuse, New York 13202, the addresses designated by said attorneys for that purpose, by depositing a true copy of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Jean M. Rice

Sworn to before me this
7th day of February, 1974.

Douglas A. Eldridge

DOUGLAS A. ELDRIDGE
Notary Public in the State of New York
Onondaga County, Term Expires March 30, 1974

Supreme Court, U. S.
FILED
FEB 27 1974
MICHAEL RODAK, JR., CLERK

(24-E)

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated; ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated; JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK.
[AFTER REMAND, 409 U.S. 1052 (#72-582).]

BRIEF IN REPLY TO "BRIEF IN SUPPORT OF MOTION TO AFFIRM" OF APPELLEE STUCK

LOUIS J. LEFKOWITZ
Attorney General of the State of New York
Attorney for Appellant Lavine
The Capitol
Albany, New York 12224
Telephone: (518) 474-7178

RUTH KESSLER TOCH
Solicitor General

ALAN W. RUBENSTEIN
Principal Attorney

of Counsel

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-8457

INDEX.

PAGE

Brief in Reply to "Brief in Support of Motion to Affirm" of Appellee Stuck 1

Conclusion. The motion to affirm should be denied. The appeal of Anna Stuck should be dismissed..... 4

CASE CITED.

State Board of Election Commissioners, *et al.* v. Evers, *et al.*, 405 U.S. 1001 (1972) 3

STATUTE.

28 U. S. C. Section 1253 2

RULES.

Rules of the Supreme Court:

Rule 13 2
Rule 10, subdivision 4 2
Rule 16 3

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,
Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated; ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated; JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,
Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.
[AFTER REMAND, 409 U.S. 1052 (#72-582).]

BRIEF IN REPLY TO "BRIEF IN SUPPORT OF MOTION TO AFFIRM" OF APPELLEE STUCK

We note our opposition to the motion to affirm, filed February 11, 1974, made on behalf of appellee Anna Stuck.[1]

[1] Anna Stuck had intervened as a plaintiff in the District Court. The order of the District Court had granted summary judgment in her favor as a named plaintiff. Thus we refer to her as an "appellee".

We would have foregone further briefing at this time had appellee Stuck not sought to interject her appeal (from that part of the order of the Court below which denied retroactive welfare payments to her) into appellant Lavine's appeal (and the separate appeal of County Commissioner Lascaris [No. 73-1016] as well[2]) via her "Brief in Support of Motion to Affirm".

The Index to the Record on Appeal prepared by the Clerk of the United States District Court for the Northern District of New York shows that a notice of appeal on behalf of appellee Anna Stuck was filed in the District Court on November 12, 1973. In accordance with the provisions of Rule 13 of the Rules of this Court, the time for docketing the appeal heretofore taken on behalf of appellee Anna Stuck pursuant to 28 U.S.C., Section 1253, expired 60 days from the filing of such notice of appeal, to wit, on January 11, 1974. To the best of our knowledge, information and belief, no application for an extension of time to docket that appeal was made or granted, and such appeal has not been docketed in this Court.

Appellee Stuck now attempts to bring her appeal before this Court on the coat tails, as it were, of the appeals heretofore duly docketed by appellant Lavine and by County Commissioner Lascaris. We address ourselves solely to the propriety of such action on the part of appellee Stuck.

The "Brief in Support of Motion to Affirm" filed with this Court by appellee Stuck on February 11, 1974 recites (page 9):

---

[2] Pursuant to Rule 10, subdivision 4 of the rules of this Court, we have, as to Commissioner Lavine's appeal, designated County Commissioner Lascaris as an appellee. As to No. 73-1016 County Commissioner Lascaris is, of course, the appellant.

> "A notice of appeal from the decision of the three-judge Court was filed in behalf of Anna Stuck in this matter. No separate jurisdictional statement was filed since such a statement would have simply reiterated the lengthy jurisdictional statement of each of the Appellants and since the question of retroactivity is 'fairly comprised' within the questions set forth in the jurisdictional statements. Supreme Court Rule 15(1)(c)."

The attempt by appellee Stuck to perfect her appeal in such fashion should, it is respectfully submitted, be dismissed, not only for complete failure to comply with the rules of this Court, but also as an attempt to avoid the consequences of failure to timely docket such appeal or to request an enlargement of time to do so. This Court has excused late docketing in some cases, while refusing to do so in others. See *State Board of Election Commissioners, et al.* v. *Evers, et al.*, 405 U.S. 1001 (1972) (Mr. Justice BLACKMUN and Mr. Justice REHNQUIST concurring; Mr. Justice DOUGLAS dissenting). We know of no case, however, in which the absolute failure to docket the case, as in the case of the appeal of appellee Stuck, has been excused by the Court.

If the Court, in its discretion, should decide to entertain such appeal, it is respectfully requested (1) that the Court order the appeal of Anna Stuck docketed as a separate appeal, and (2) that appellant Lavine be granted time to file a motion to dismiss or affirm addressed thereto pursuant to Rule 16 of the Rules of this Court as he may be advised.

We respectfully submit, however, that the appeal heretofore taken by Anna Stuck by notice of appeal filed November 12, 1973 should be dismissed.

CONCLUSION

The motion to affirm should be denied. The appeal of Anna Stuck should be dismissed.

Dated: February 21, 1974.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellant Lavine

RUTH KESSLER TOCH
Solicitor General

ALAN W. RUBENSTEIN
Principal Attorney

of Counsel

Supreme Court, U. S.
FILED
MAY 16 1974
MICHAEL RODAK, JR., CLERK

Nos. 73-406, 73-1016, 73-1095, and 73-5650

In the Supreme Court of the United States

OCTOBER TERM, 1973

KEVIN BURNS, COMMISSIONER, STATE OF IOWA, DEPARTMENT OF SOCIAL SERVICES, ET AL., PETITIONERS

v.

JANE DOE, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, JENNIFER, ET AL.

JOHN LASCARIS, INDIVIDUALLY AND AS COMMISSIONER OF THE DEPARTMENT OF SOCIAL SERVICES OF THE COUNTY OF ONONDAGA, APPELLANT

v.

SYLVIA SHIRLEY, INDIVIDUALLY AND ON BEHALF OF HER MINOR DEPENDENT CHILDREN, TAMMY LYNN AND LISA MARIE, ET AL.

ABE LAVINE, INDIVIDUALLY AND AS COMMISSIONER OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK, APPELLANT

v.

SYLVIA SHIRLEY, INDIVIDUALLY AND ON BEHALF OF HER MINOR DEPENDENT CHILDREN, TAMMY LYNN AND LISA MARIE, ET AL.

JANE DOE, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, JENNIFER, ET AL., PETITIONERS

v.

KEVIN BURNS, COMMISSIONER, STATE OF IOWA, DEPARTMENT OF SOCIAL SERVICES, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-406

KEVIN BURNS, COMMISSIONER, STATE OF IOWA DEPARTMENT OF SOCIAL SERVICES, ET AL., PETITIONERS

v.

JANE DOE, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, JENNIFER, ET AL.

No. 73-1016

JOHN LASCARIS, INDIVIDUALLY AND AS COMMISSIONER OF THE DEPARTMENT OF SOCIAL SERVICES OF THE COUNTY OF ONONDAGA, APPELLANT

v.

SYLVIA SHIRLEY, INDIVIDUALLY AND ON BEHALF OF HER MINOR DEPENDENT CHILDREN, TAMMY LYNN AND LISA MARIE, ET AL.

No. 73-1095

ABE LAVINE, INDIVIDUALLY AND AS COMMISSIONER OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF NEW YORK, APPELLANT

v.

SYLVIA SHIRLEY, INDIVIDUALLY AND ON BEHALF OF HER MINOR DEPENDENT CHILDREN, TAMMY LYNN AND LISA MARIE, ET AL.

547-292—74——1

No. 73–5650

JANE DOE, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILD, JENNIFER, ET AL., PETITIONERS

v.

KEVIN BURNS, COMMISSIONER, STATE OF IOWA, DEPARTMENT OF SOCIAL SERVICES, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the Court's orders of December 10, 1973 and March 4, 1974 inviting the Solicitor General to express the views of the United States in these cases. The cases generally present the question whether, consistently with the Social Security Act, a state may require a parent to cooperate in securing support for a child from persons liable for such support as a condition of the parent's (but not the child's) receipt of Aid to Families with Dependent Children ("AFDC").

STATEMENT

Nos. 73–406 and 73–5650 involve an Iowa statute (Iowa Code Ann. § 239.5) which requires that, to be eligible for AFDC, a parent must cooperate in "efforts to obtain support money" for her children. The Court of Appeals for the Eighth Circuit affirmed a district court holding that the Iowa statute violated

the Social Security Act. The appellate court modified the district court decision to eliminate a provision for retroactive payment of AFDC benefits to persons who had been denied benefits because of the Iowa statute, and thus found it unnecessary to decide whether the Eleventh Amendment barred such retroactive payments.[1]

The other cases (Nos. 73–1016 and 73–1095) are direct appeals from a decision by a three-judge district court in the Northern District of New York declaring Section 101–a of the New York Social Services Law invalid "insofar as it makes recipient cooperation in a paternity or support action against an absent parent a condition of eligibility for AFDC" (Lascaris J. S. App. 10a).

The courts invalidated both the Iowa and the New York provisions on the ground that they impermissibly imposed an eligibility requirement in addition to those provided in the Social Security Act, 42 U.S.C. 601, *et seq.* (Lavine J. S. 24–25; Burns Pet. App. 2a).

DISCUSSION

These cases present an important question in the administration of the Social Security Act which the United States believes this Court should review. The issue is whether the Social Security Act permits states to require, as a condition of a parent receiving AFDC

[1] No. 73–5650 and Question II in No. 73–406 concern the effect of the Eleventh Amendment on suits for retroactive state welfare payments. We express no views on these questions, which may have been settled by this Court's decision in *Edelman* v. *Jordan*, No. 72–1410, decided March 25, 1974.

benefits, that the parent cooperate in determining the paternity of, or securing support for, his or her child. The Department of Health, Education, and Welfare has advised us that ten states (which include Iowa and New York), containing more than one-third of AFDC recipients, require such parental cooperation as a condition of their AFDC eligibility.[2] We submit that the Social Security Act permits the imposition of such conditions, both because the conditions do not conflict with any part of the Act and because they further the purposes of the federal program.

The Social Security Act contains a number of provisions indicating Congress' continuing concern that absent parents should support AFDC children. 42 U.S.C. 602(a)(17)(A) requires each state to implement a program:

> (i) * * * to establish the paternity of such child and secure support for him, and
>
> (ii) in the case of any child * * * who has been deserted or abandoned by his parent, to secure support for such child from such parent

---

[2] The Secretary of Health, Education, and Welfare has issued a regulation, 45 C.F.R. 233.90(b)(4) (38 Fed. Reg. 10940), indicating that states can deny aid to a non-cooperating parent or caretaker, though not to such person's child. The regulation states: "A child may not be denied AFDC * * * because a parent or caretaker relative fails to assist: (i) In the establishment of paternity of a child born out of wedlock; or (ii) in seeking support from a person having a legal duty to support the child * * * neither this nor any other provision of these regulations should be construed to require that provision be made by a State in its AFDC program for the maintenance of a parent or caretaker who fails to provide such assistance and AFDC may be denied with respect to such parent or caretaker."

> * * * utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support * * *.

Section 602(a)(17)(B) requires that there be a special administrative unit in each state to establish paternity and obtain support, and Section 602(a)(18) requires states to enter into agreements with law enforcement and judicial agencies to help them in this task. Sections 602(a) (21) and (22) require states to provide information useful in locating deserting parents and to assist each other in obtaining and enforcing support obligations of such parents.

This Court has upheld the validity of state provisions making AFDC eligibility conditional on the parent's taking certain actions in furtherance of the aims of the Social Security Act. In *Wyman* v. *James*, 400 U.S. 309, a New York State requirement that welfare applicants and recipients allow AFDC caseworkers to visit their homes was upheld against a challenge based primarily upon the claim that such visits violated the applicants' and recipients' Fourth Amendment rights. The Court noted that a home visit, though not specifically required by the Act, is a key vehicle of welfare administration, and that a visit was especially important in light of the congressional intent that increased social services be provided (*id.* at 319–320). The Court also noted a number of other federal policies which a home visit might further, such as assessment of the income and resources of the family and prevention of the abuse of the child or misuse of payments made on its behalf (*id.* at 315–

316). The Court "conclude[d] that the home visitation as structured by the New York statutes and regulations is a reasonable administrative tool" and "that it serves a valid and proper administrative purpose for the dispensation of the AFDC program" (*id.* at 326).

Similarly, the State regulations here challenged also are a reasonable administrative tool for accomplishing the statutory objective of establishing the paternity of and obtaining support for AFDC children. Without the cooperation of the other parent, it would often be impossible for the State to achieve those objectives. Indeed, the State regulations here involved are less severe than the home visit regulation upheld in *James*, since non-compliance with the latter resulted in depriving both parent and child of aid, whereas the requirement here terminates only the payment for the parent, but not for the child.[3]

In the most recent case dealing with a state imposed

[3] In *Juras* v. *Meyers*, 404 U.S. 803, *Weaver* v. *Doe*, 404 U.S. 987, and *Carleson* v. *Taylor*, 404 U.S. 980, this Court summarily affirmed the action of three-judge district courts striking down state requirements comparable to those at issue here which denied aid both to the non-cooperating parent and to the dependent child. Each of the district courts took particular notice of Congress' intention that aid should not lightly be denied to the dependent child. *Meyers* v. *Juras*, 327 F. Supp. 759, 762 (D. Ore.); *Doe* v. *Swank*, 332 F. Supp. 61, 63 (N.D Ill.); *Taylor* v. *Martin*, 330 F. Supp. 85, 89 (N.D. Cal.) Unlike the requirements in the above cases, which excluded otherwise eligible children from the AFDC program, the conditions here at issue are designed to effectuate specific policies and provisions of the Act while not undermining the primary purpose of the AFDC program—aid to needy children.

eligibility requirement under AFDC, *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, this Court held that the federal work incentive program did not pre-empt a New York requirement that, in order to maintain eligibility for AFDC payments, certain employable individuals must comply with a program designed to secure work for them. The Court noted that the state requirements did not conflict with federal requirements and concluded (*id.* at 421):

> Where coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one.

The Court stated that in the case of work requirements, "the Act allows for complementary state work incentive programs and procedures incident thereto—even if they become conditions for continued assistance. Such programs and procedures are not necessarily invalid, any more than other supplementary regulations promulgated within the legitimate sphere of state administration [citing *Wyman* v. *James, supra*]" (*id.* at 422).

Just as the Act "allows for" state work incentive programs and work-related eligibility requirements, the Act also "allows for" state programs and eligibility requirements designed to further and complement the federal policy of obtaining support for AFDC children from those legally required to support them. " '[S]o long as the State's actions are not in violation of any specific

provision of the Constitution or the Social Security Act, the courts may not void them" (*id.* at 423, n. 29).

The Court distinguished cases holding that any state additional eligibility condition violates the requirement in 42 U.S.C. 602(a)(10) that aid be furnished "to all eligible individuals" on the ground that those cases involved requirements where there was "no room either in the Act's language or legislative history to warrant the State's additional eligibility requirements" (*id.* at 421–422).

In those cases, *King* v. *Smith*, 392 U.S. 309, *Townsend* v. *Swank*, 404 U.S. 282, and *Carleson* v. *Remillard*, 406 U.S. 598, the state eligibility standards in issue varied from the federal standards contained in the Act, 42 U.S.C. 606(a) (see *Townsend* v. *Swank*, *supra*, 404 U.S. at 286; *Jefferson* v. *Hackney*, 406 U.S. 535, 545), and thus operated to exclude from the AFDC program one or more groups which Congress has defined as "dependent children." Thus in *King* v. *Smith*, the state standard defined "parent" in a manner inconsistent with the term as Congress had intended it, thereby excluding from its AFDC program a group covered by the Act. In *Townsend* v. *Swank*, the state denied AFDC benefits to a group of dependent children between the ages of 18 and 21 who attended college or a university, and limited such benefits to children who attended high school or vocational training school, even though the Social Security Act defined "dependent child" to include a child under 21 who was "a student regularly attending

a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment" (42 U.S.C. 606(a)(2)(B)). And in *Carleson* v. *Remillard*, the state excluded from AFDC benefits by means of a standard which the Court found to be inconsistent with the federal "continued absence" standard, the group of children whose parent was absent due to military service. Moreover, in none of those cases was a state attempting through the use of an eligibility standard to implement a federal welfare policy. Indeed, to the extent that the eligibility standards in *King*, *Townsend* and *Remillard* conflicted with the definitional standards set forth in the Act, they frustrated federal policy.

In the present case, the state regulations requiring a parent to cooperate in establishing paternity or obtaining support directly further a clear federal welfare policy and do not conflict with or vary from the definitional standards contained in the Act.

We submit that in "the scheme of cooperative federalism" (*King*, *supra*, 392 U.S. at 316) which is AFDC, states are not precluded from acting to secure support for children from those legally obligated to support them, even by making cooperation a condition of the parent's eligibility for welfare benefits. The validity of these requirements is an important question, both because it concerns the state discretion which is a keystone of federal welfare administration and because it affects the ability of States to implement the purposes of the Social Security Act.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted as to Question I in No. 73-406, and that probable jurisdiction should be noted in Nos. 73-1016 and 73-1095.

ROBERT H. BORK,
Solicitor General.

MAY 1974.

U.S. GOVT. PRINTING OFFICE 1974

Supreme Court, U. S.
FILED
JUL 25 1974
MICHAEL RODAK, JR., CLERK

(72-E)

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT LAVINE

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellant Lavine
The Capitol
Albany, New York 12224
Telephone: (518) 474-7178

RUTH KESSLER TOCH
Solicitor General of the State of New York

ALAN W. RUBENSTEIN
Principal Attorney, State of New York
of Counsel

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-0457

INDEX.

PAGE

Opinion Below 1

Jurisdiction 2

Statute Involved of the State of New York 2

Regulation Involved of the Secretary of Health, Education and Welfare 3

Statutes of the United States 4

Questions Presented 4

Statement of the Case 5

Summary of Argument 12

Point I. It is the responsibility of parents, not the State, to support their children. The decision below erroneously reverses this basic concept by attributing to Congress an unexpressed intent to do so 13

A. The Notice to Law Enforcement Officers (NOLEO) Amendment of 1950 (42 U.S.C. § 602(a)(11)) did not shift parental support responsibilities from parents to the State.... 16

B. The 1967 Amendments to the Social Security Act (42 U.S.C. § 602(a)(17)(18)(21)(22)) did not shift parental support responsibilities from parents to the State 22

C. 42 U.S.C. § 602(a)(7) requires that the States in determining need take into consideration the income and resources of a child or relative claiming AFDC. In fulfilling such requirement, the State must take into account "any" income and resources. The provisions of section 602(a)(7) did not shift parental support responsibilities from parents to the State. On the contrary, such provisions are recognition of such responsibilities and place them upon the parents where they belong.... 32

PAGE

Point II. New York Social Services Law § 101-a(2)(3) operates within the legitimate sphere of State AFDC administration and serves legitimate State purposes. The State statute is valid even if it is held to create a condition for assistance..... 38

Conclusion 45

Appendix A—Statutes of the United States 46

Appendix B—Brief in the District Court Concerning "Substantiality" 49

CITATIONS.

CASES:

Charleston v. *Wohlgemuth*, 332 F. Supp. 1175 (D.C. Penn., 1971) affd. 405 U.S. 970 (1972) 41
Doe v. *Gillman*, 347 F. Supp. 482 (N.D. Iowa, 1972) modified 479 F. 2d 646 (8th Cir., 1973), petition for certiorari pending *sub nom. Burns* v. *Doe*, No. 73-406 40
Doe v. *Harder*, 310 F. Supp. 302 (D.C. Conn., 1970), app. dis. for want of jurisdiction, 399 U.S. 902 (1970) 40
Doe v. *Lavine*, 347 F. Supp. 357 (S.D.N.Y., 1972) 40
Doe v. *Norton*, 365 F. Supp. 65 (D.C. Conn., 1973) 36
Doe v. *Shapiro*, 302 F. Supp. 761 (D.C. Conn. [1969], app. dism. 396 U.S. 488 [1970]), rehearing den. 397 U.S. 970 (1970) 5, 36, 40, 42
Doe v. *Swank*, 332 F. Supp. 61 (N.D. Ill., 1971) affd. *sub nom. Weaver* v. *Doe*, 404 U.S. 987 (1971) 39
Dunbar v. *Dunbar*, 190 U.S. 340 (1903) 14
Fite v. *Miller*, 280 App. Div. 12 (4th Dept., 1952) 14
Ginberg v. *New York*, 390 U.S. 629 (1968) 15
Glona v. *American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968) 5
Gomez v. *Perez*, 409 U.S. 535 (1973) 15
James v. *Goldberg*, 302 F. Supp. 478 (1969) 37
Jefferson v. *Hackney*, 406 U.S. 535 (1972) 39, 41
King v. *Smith*, 392 U.S. 309 (1968) 5, 26, 38, 39
Landes v. *Landes*, 1 N Y 2d 358, app. dism. 352 U.S. 948 (1956) 14
Lavine v. *Shirley*, 365 F. Supp. 818 2
Lavine v. *Shirley*, 409 U.S. 1052 [No. 72-582] 5

PAGE

Levy v. *Louisiana*, 391 U.S. 68 (1968) 5
Lewis v. *Lavine* (Dkt. No. 72-CV-4249 [S.D.N.Y.]) 11
Lewis v. *Martin*, 397 U.S. 552 (1970) 38
Meyers v. *Juras*, 327 F. Supp. 759 (D. Or., 1971) affd. 404 U.S. 803 (1971), reh. den. 404 U.S. 961 39
New York State Department of Social Services v. *Dublino*, 413 U.S. 405 (1973) 15, 26, 39, 41, 42, 43, 44
Prince v. *Massachusetts*, 321 U.S. 158 (1943) 15
Saiz v. *Hernandez*, 340 F. Supp. 165 (D. New Mexico [1972]) 36
Shapiro v. *Thompson*, 394 U.S. 618 (1969) 26
Stanley v. *Illinois*, 405 U.S. 645 (1972) 15
Strecker v. *Strecker*, 10 A D 2d 312 (1st Dept. [1960]). 14
Taylor v. *Martin*, 330 F. Supp. 85 (U.S.D.C, N.D. Calif. 1971), affd. *sub nom.*, *Carleson* v. *Taylor*, 404 U.S. 980 (1971) 39
Woods v. *Miller*, 318 F. Supp. 510 (W.D. Pa., 1970) 40
Wyman v. *James*, 400 U.S. 309 (1971) 5, 23, 36, 41, 42

STATUTES OF THE UNITED STATES:

Social Security Act § 402(a)(17) 30
28 U.S.C. § 1253 2
28 U.S.C. § 1331 ..... 6, 7, 10
28 U.S.C. § 1343 ..... 6, 7, 10
42 U.S.C. § 602(a)(7) 4, 12, 16, 32, 33, 34, 35, 36, 38
42 U.S.C. § 602(a)(11) 4, 16, 17, 21, 39, 42
42 U.S.C. § 602(a)(15) 22
42 U.S.C. § 602(a)(17) 4, 12, 13, 16, 22, 23, 31
42 U.S.C. § 602(a)(18) 4, 16, 22, 23, 31, 44
42 U.S.C. § 602(a)(20) 31
42 U.S.C. § 602(a)(21) 4, 16, 22, 23, 31, 44
42 U.S.C. § 602(a)(22) 4, 16, 22, 23, 31, 44
42 U.S.C. § 603(d) 26
42 U.S.C. § 606(b) 42
42 U.S.C. § 610 23
42 U.S.C. § 1983 ..... 6, 7
49 Stat. 627 33
60 Stat. 1095 16
70 Stat. 850 20
83 Stat. 45 26
Public Law 87-543 16

PAGE

STATUTES OF THE STATE OF NEW YORK.

New York Family Court Act § 413 13
New York Family Court Act § 414 14
New York Family Court Act § 513 14
New York Social Services Law § 101 14
New York Social Services Law § 101-a(1) 7, 11, 14
New York Social Services Law § 101-a(2)(3) .. 2, 4, 5, 8, 10, 12, 13, 15, 21, 32, 38, 39, 45

REGULATIONS OF THE SECRETARY OF HEALTH, EDUCATION AND WELFARE.

45 C.F.R. § 233.90(b)(4)(i)(ii) 3, 11, 20, 21
45 C.F.R. § 235.70 20

MISCELLANEOUS:

1967 Congressional Record, House, p. 23048 *et seq.* .. 27
1967 Congressional Record, House, p. 23055 26
1967 Congressional Record, House, pp. 36366, 36367, 36368 26
1967 Congressional Record, Senate, p. 32592 28
1967 Congressional Record, Senate, p. 32593 28
1967 Congressional Record, Senate, p. 32851 29
1967 Congressional Record, Senate, p. 33540 31
1967 Congressional Record, Senate, p. 36306 31
1967 Congressional Record, Senate, p. 36319 29
1967 Congressional Record, Senate, p. 36925 30
1962 United States Code, Congressional Administrative News, p. 1943 at p. 1959 ..... 22, 34
Senate Report No. 734 of 1939 ..... 33, 34
House Report No. 728 of 1939 33
Senate Report No. 1669 of 1950 17
House Report No. 1300 of 1950 ..... 17, 42
House Report No. 544 of 1967 23
Senate Report No. 744 of 1967 23
Senate Report No. 91-223 of 1969 26
Regulation of the New York State Department of Social Services 18 NYCRR § 369.2(f)(3)(ii)(e) 6
Handbook of Public Assistance Administration, Department of Health, Education and Welfare, Part IV, Section 8149 21
Handbook of Public Assistance Administration, Department of Health, Education and Welfare, Part IV, Section 8120 ..... 20, 21

PAGE

McKeany, Maurine, "The Absent Father and Public Policy in the Program of Aid to Dependent Children", University of California Press, 1960, pp. 41, 42 and pp. 45-46 18

"Characteristics of ADC Families in New York State, January 1971" 42

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANT LAVINE

Opinion Below

The "Memorandum-Decision and Order" of the three-judge District Court filed September 26, 1973 as amended

by order of October 4, 1973 is set out as Appendix "A" to the "Statement as to Jurisdiction on behalf of Appellant Lavine". It is reported at 365 F. Supp. 818.

Jurisdiction

The "Memorandum-Decision and Order" of the three-judge District Court was entered on September 26, 1973. The Notice of Appeal of Appellant Lavine was filed in the office of the clerk of the United States District Court for the Northern District of New York on November 14, 1973. The case was docketed January 12, 1974, and on June 10, 1974 the Court noted probable jurisdiction. The jurisdiction of this Court rests upon 28 U. S. C. § 1253.

Statute Involved of the State of New York

New York Social Services Law, § 101-a(2) (3)[1]

(52A McKinney's Social Services Law,
Page 35, pocket part)

"§ 101-a Proceedings to compel support by persons in need thereof

• • •

"2. An applicant or recipient of public assistance who is the parent of a child or minor shall assist and cooperate with the social services official and appropriate authorities to obtain support or contributions to support for such child or spouse from the other parent or spouse by:

"(a) Furnishing the social services official with appropriate information including the location of the other parent or spouse.

---

[1] As added by Chapter 687 of the Laws of New York of 1972. Section 4 of Chapter 687 provides as follows:

"§ 4. The provisions of this act shall be ineffective to the extent that they are determined to be not in compliance with federal law regulations pertaining to public assistance and care."

"(b) Filing a petition and furnishing evidence in a proceeding for the establishment of the child's paternity and support under article five of the family court act.

"(c) Filing a petition and furnishing evidence in a proceeding to secure support for her child and herself under article four of the family court act.

"3. In the event an applicant or recipient of public assistance fails to institute a proceeding in accordance with the provisions of this section or other similar provisions of law, the social services official shall institute such proceeding under the appropriate provisions of the family court act and if such applicant or recipient willfully fails or refuses to furnish evidence necessary to support such petition, or furnish information relative to the location of the other parent, the social services official shall not provide or continue to provide assistance or care for the maintenance of such applicant or recipient so long as such applicant or recipent fails to assist or cooperate as required by the provisions of this section or other provisions of law."

Regulation Involved of the Secretary of Health, Education and Welfare

45 C.F.R. §233.90(b)(4)(i)(ii)

"§ 233.90 Factors specific to AFDC.

• • •

"(b) *Condition for plan approval.*—

• • •

"(4) A child may not be denied AFDC either initially or subsequently because a parent or caretaker relative fails to assist;

"(i) In the establishment of paternity of a child born out of wedlock; or

"(ii) In seeking support from a person having a legal duty to support the child; But neither this nor any other provision of these regulations should be construed to require that provision be made by a State

in its AFDC program for the maintenance of a parent or caretaker who fails to provide such assistance and AFDC may be denied with respect to such parent or caretaker.

* * *"

(38 Federal Register 10940, May 3, 1973, to be effective July 2, 1973.)

Statutes of the United States

42 U.S.C. § 602(a)(7), (11), (17), (18), (21) and (22) are set out as Appendix A to this brief.

Questions Presented

Do the provisions of New York Social Services Law, § 101-a (2)(3) that a social services official shall not provide assistance or care for the maintenance of a parent, who is an applicant for or recipient of public assistance, who willfully fails or refuses to furnish evidence to support a petition by a social services official, brought in the Family Court of the State of New York under appropriate provisions of the Family Court Act, to establish a child's paternity and support or to secure support for such applicant's or recipient's child and herself[2] or to furnish appropriate information including the location of the other parent, so long as such parent fails to assist or cooperate as required by such section or other provisions of law, conflict with the provisions of the Social Security Act?

Does a regulation of the Secretary of Health, Education and Welfare authorizing denial of maintenance to a

[2] Although New York Social Services Law § 101-a(2) (3) also requires a parent to cooperate in obtaining support for "herself" the Order below dealt only with obtaining support for children from an absent parent. Any requirement that the parent cooperate in obtaining support for "herself" is not involved in the case.

parent who fails to provide such assistance conflict with the provisions of the Social Security Act?[3]

Statement of the Case

Preliminarily we note that the case at bar has been before this Court previously (*Lavine* v. *Shirley*, 409 U. S. 1052 [No. 72-582]). This Court remanded. As will appear *infra* the three-judge Court below after remand permitted intervention, by Anna Stuck and amendment of the Complaint. The Court below found that the original named plaintiffs no longer felt aggrieved due to intervening events. The Court below, however, in its "Memorandum-Decision and Order" (J. S. 19) did not change the title of the action nor have we. We here set out the history of the action since its inception. It must be noted, however, that the Order herein was in favor of Anna Stuck. The original named plaintiffs were not named in the Court's Order.

---

[3] In the Court below we moved to dismiss the amended complaint for lack of subject matter jurisdiction in that it was argued that the complaint failed to present a substantial constitutional question, thereby depriving the Court below of jurisdiction in this Civil Rights Action. We do not pursue the question of "substantiality" (Jurisdictional Statement p. 12) because the Court has not postponed jurisdiction or requested the parties to address themselves to that question. While it is arguable whether the "Questions Presented" "fairly comprise" the question of the constitutionality of New York Social Services Law § 101-a(2) (3), we submit that in any event "The choice [as to cooperation] is entirely hers [the mothers] and nothing of constitutional magnitude is involved." *Wyman* v. *James*, 400 U.S. 309, 324 (1971). We have set out as Appendix "B" to this brief, our briefing in the District Court on this point.

Anna Stuck has not been barred from the welfare roles because of the illegitimacy of her child, but rather, because she has failed to cooperate in locating the father of her child. Any attempt to analogize this case to either *Levy* v. *Louisiana*, 391 U.S. 68 (1968) or *Glona* v. *American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968) must, therefore, fail. *Cf.* following: *Doe* v. *Shapiro*, 302 F. Supp. 761 at 762 (D.C. Conn. [1969], app. dismissed 396 U.S. 488 [1970], rehearing den. 397 U.S. 970 [1970]). See also *King* v. *Smith*, 392 U.S. 309 (1968) (Mr. Justice DOUGLAS concurring, p. 335, footnote 4).

The plaintiffs in the original complaint (appellees on the first appeal in this Court prior to remand) were persons against whom it was claimed that New York Social Services Regulation 18 N. Y. C. R. R. § 369.2(f)(3)(ii)(e) had been applied to require them to institute and prosecute non-support proceedings against deserting or abandoning fathers (A. 7). Sylvia Shirley allegedly declined to file a petition for non-support against her husband (A. 10); Elizabeth Anderson allegedly was required to file a petition for non-support against her husband from whom she was separated and who she claimed was already supporting her to the full extent of his ability. She wished to withdraw the petition for non-support which had been filed (A. 12). As to "Jane Doe" what was involved was an alleged effort to require her to file a non-support proceeding against the father of one of her children (A. 12). The original complaint alleged that the departmental regulation on its face and as applied was invalid as establishing an additional eligibility requirement not provided for by the Social Security Act (A. 15). The original complaint alleged jurisdiction under "42"[4] U. S. C. § 1343(3)(4), 42 U. S. C. § 1983 and 28 U. S. C. § 1331 (A. 7).

The suit was filed on behalf of the original named plaintiffs on March 23, 1972 and was heard by a District Court of three judges. After answer by both the State and County defendants (A. 22, 30), the plaintiffs on May 26, 1972 filed a motion for summary judgment (A. 34) which was granted by the Court below in its oral opinion of June 7, 1972 (A. 49) and implemented by its order dated July 14, 1972, filed July 21, 1972 (A. 63).

An appeal to this Court from that order was filed by the State Commissioner of Social Services on August 10,

[4] Apparently 28 U.S.C. was meant.

1972 (A. 65) and the case was subsequently docketed in this Court as number 72-582.

On December 11, 1972, this Court vacated the judgment below and remanded the case "for further consideration in light of chapter 687 of the 1972 Laws of New York (New York Social Services Law § 101-a as amended)" (A. 69) (409 U. S. 1052). The effective date of the amended statute was September 1, 1972.

After this Court's remand, plaintiffs' attorney brought on by order to show cause filed March 20, 1973 (A. 71) a motion to (1) reconvene the three-judge Court, (2) permit amendment of the complaint, and (3) permit intervention by Anna Stuck. That motion was returnable April 9, 1973. Both the State and County defendants moved to dismiss the action for lack of subject matter jurisdiction on the ground that the case had become moot (R. 200, 213). The motions were ordered held for the three-judge Court by District Judge Port.

By its order dated April 9, 1973, filed April 18, 1973 (A. 76), this Court granted plaintiffs' motion to amend the complaint and to intervene Anna Stuck.

The Amended Complaint (A. ....)

The amended complaint (permitted by the Order of the Court below of April 9, 1973), also alleged jurisdiction under "42"[5] U. S. C. § 1343 (3) (4), 42 U. S. C. § 1983 and 28 U. S. C. § 1331 (A. 80). No statement of claim on behalf of the plaintiffs in the original action was made. The Court below in its Memorandum-Decision of September 23, 1973 noted that:

---

[5] Apparently 28 U.S.C. was meant.

> "The amended complaint does not reallege the facts concerning the original named plaintiffs. This omission was by design since they no longer feel themselves aggrieved due to intervening events. In its present posture, then, this is an action by Anna Stuck on behalf of herself, her minor children, and all others similarly situated • • •." (Jurisdictional Statement, page 23)[6]

The amended complaint contained the following "Statement of Claim" on behalf of the intervening plaintiff, Anna Stuck:

> "Intervening Plaintiff Anna Stuck has been receiving public assistance for herself and her four infant children since 1970. She was required by the Onondaga County Department of Social Services to appear at their offices for the biannual recertification of her eligibility for public assistance. She did so on February 2, 1973. She was told that she must bring a paternity action against the father of her youngest child herself, or authorize the Department to do so, and that she must cooperate fully with the Department in such action. She refused to cooperate in the bringing of such an action; her refusal was based on the fact that the father of her youngest child is disabled and is not able to support the child. Furthermore, she had been required by the Department of Social Services to file a paternity suit against the father of her first three children. That filing had lead to constant strife between her and the respondent. She does not wish to duplicate that situation with the father of her youngest child." (A. 83)

The amended complaint alleged two causes of action. The first cause of action alleged that New York Social Services Law § 101-a(2) (3) establishes "an additional eligibility requirement not provided for by the Social Security Act." (A. 85) Constitutional allegations are set forth in the second cause of action as follows:

---

[6] Hereinafter referred to as "J.S."

> "Defendants' action in erecting an additional requirement of eligibility constitutes a denial of equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that it creates an invidious and unjustifiable distinction. New York's action in this case requires that impoverished mothers institute and cooperate in proceedings against their children's fathers; no such requirement is imposed on the well-to-do. Marriages of the well-to-do are not driven asunder by forcing one spouse to prosecute another. Classifications based on wealth have long been recognized as peculiarly obnoxious to the principles of equality enshrined in the Fourteenth Amendment." (A. 85)

Answer of Appellant Lavine (A. 105)

As appears from appellant's answer, appellee Anna Stuck had a departmental fair hearing on March 1, 1973. Returned with the answer was the fair hearing decision of March 7, 1973 (A. 117). That fair hearing decision stated in part:

> "Appellant refused to disclose the location of the putative father of her youngest child. Appellant conceded at the fair hearing that she knew the mailing address of the putative father and had declined and still refused to disclose it. She had told the agency his name and the community where he presumably resided.
>
> "The record establishes that appellant had declared that she would not initiate paternity proceedings and desired that the agency not do so. Based upon the degree of cooperation received from appellant as to other information about the putative father, the agency properly found appellant's lack of cooperation to be a basis for termination of her assistance."

The answer, *inter alia*, denied the allegations set forth in plaintiffs' first and second causes of action.

Separate affirmative defenses of failure to state a claim upon which relief could be granted were alleged as to the original plaintiffs and as to plaintiff Stuck. As has been noted, appellant Lavine's motion to dismiss the action on the grounds that the case had become moot was held by Judge Port for the three-judge Court. The answer sets out such grounds as an affirmative defense, and additionally, sets out the affirmative defense of lack of subject matter jurisdiction under 28 U.S.C. § 1343 and under 28 U.S.C. § 1331. (These additional grounds were also contained in a motion to dismiss served coincidentally with appellant's answer and returnable before the three-judge Court on the argument on May 11, 1973 (R. 249.) Further affirmative defenses were lack of jurisdiction to award damages as prayed for in the amended complaint against defendant Lavine (appellant here); lack of standing and lack of capacity to sue; lack of an actual case of controversy, lack of a justiciable controversy; that plaintiffs Shirley, Anderson and Doe had failed to exhaust administrative remedies and that all plaintiffs had failed to exhaust State judicial remedies; and finally, that New York Social Services Law § 101-a (2) (3) is valid and constitutional.

The Court below considered the motions to dismiss as motions for summary judgment (J.S. 22) and granted summary judgment in favor of the plaintiff Anna Stuck only (J.S. 34).

The three-judge District Court on September 23, 1973 rendered its "Memorandum-Decision and Order" which was filed September 26, 1973. The "Memorandum-Decision" was amended by order of October 4, 1973.

The three-judge Court held that the "[p]laintiffs • • • have raised a substantial question with respect to the con-

stitutionality of New York Social Services Law § 101-a as amended" but the Court disposed of the case on the "statutory claim rather than indulge in a constitutional ruling." (J.S. 24.)

The Court stated that "While we are not outraged by nor unsympathetic to New York's effort to compel Anna Stuck to cooperate in a proceeding to compel support for her youngest child to the extent required by § 101-a, we find no authority for engrafting such a condition on to the Congressionally prescribed initial AFDC eligibility requirements or on to the grounds for discontinuance of benefits." (J.S. 25.)

The Court discussed 45 C.F.R. § 233.90 (b) (4) (i) (ii), a regulation of the Secretary of Health, Education and Welfare (which had become effective July 2, 1973) and which supports appellant's position. The Court indicated that it had withheld decision until after the effective date of that regulation in order "to authoritatively consider its effect." (J.S. 29.) The Court found that the "agency's new interpretation is in error and not a guidepost to be followed judicially." (J. S. 32.)

Class action status was denied because of the pendency of *Lewis* v. *Lavine* (Dkt. No. 72-CV-4249 [S.D.N.Y.]) a case also involving Social Services Law § 101-a in which a class action order had been made. (J.S. 32.)

The Court below denied plaintiffs' demand for retroactive payment. (J.S. 34.)

The Court granted summary judgment in favor of Anna Stuck "• • • declaring § 101-a, as amended, of the New York Social Services Law void, unenforceable and without effect insofar as it makes recipient cooperation in a paternity or support action against an absent parent a

condition of eligibility for AFDC" (J.S. 34), and it permanently enjoined defendants from denying or terminating AFDC assistance to appellee Anna Stuck or her minor children "for failure to cooperate in obtaining support from an absent parent of her children." (J.S. 34.)

No appeal was taken by appellant from that part of the order which permanently enjoined defendants from denying or terminating AFDC assistance to the minor children of Anna Stuck (A. 140, J.S. 36). New York Social Services Law § 101-a (2) (3) operates only upon the parent, not the children. The children's grant of AFDC continues.

Summary of Argument

I

The provisions of the Social Security Act are recognition of the primary responsibility of parents to support their children. The decision below erroneously shifts that burden of support from the parents to the State.

The provisions of the Social Security Act recognize that the right of a child to support is a valuable resource, the development and realization of which cannot be blocked by an intransigent parent.

New York Social Services Law § 101 (a) (2) (3) as added by Laws of 1972, Chapter 687 does not conflict with any specific provisions of the Constitution or the Social Security Act. On the contrary, the State statute involved implements at least two specific provisions of the Social Security Act. These are: 42 U.S.C. § 602 [a] [7] and 42 U.S. § 602 [a] [17] [A].

42 U.S.C. § 602 (a) (7) requires that a State agency shall, in determining need, take into consideration the in-

come and resources of any child or relative claiming AFDC.

42 U.S.C. § 602 (a) (17) (A) requires that a State plan must provide for the development and implementation of a program under which the State agency will undertake to establish the paternity of children born out of wedlock and secure support for them, and, as to legitimate children, secure support from a responsible parent. Thus there is no conflict between State Law and the Social Security Act. The Social Security Act allows for and requires State programs to establish paternity and obtain support.

II

New York as well as the Congress has a legitimate interest in obtaining support for deserted or abandoned children. New York Social Services Law § 101-a (2) (3) is agreeable to and furthers the provisions of the Social Security Act. The State statute is valid, however, even if it is held to create a condition for assistance, because the State statute does not conflict with any specific provision of the Constitution or the Social Security Act and operates within the legitimate sphere of State AFDC administration.

POINT I

It is the responsibility of parents, not the State, to support their children. The decision below erroneously reverses this basic concept by attributing to Congress an unexpressed intent to do so.

The primary responsibility for the support of the child is with its parents, not with the State. Under New York Family Court Act § 413, the father of a child is chargeable with its support if possessed of sufficient means or able

to earn such means. Under the provisions of New York Family Court Act § 414, if the father of a minor is dead or incapable of supporting his child or cannot be found within the State, the mother of such child is chargeable with its support. And New York Family Court Act § 513, provides, as to children born out of wedlock, *inter alia* that "[e]ach parent of a child born out of wedlock is liable for the necessary support and education of the child and for the child's funeral expenses." See also New York Social Services Law §§ 101 and 101-a (1).

The New York Court of Appeals has held:

> "Both at common law and by statute, New York has always treated a husband as absolutely responsible in keeping with his ability for the support of his dependent minor child or children * * *."
>
> *Landes* v. *Landes*, 1 NY 2d 358 at 365 (1956), app. dism. 352 U.S. 948 (1956).

See also *Strecker* v. *Strecker*, 10 New York A D 2d 312 (1st Dept., 1960) where the New York Court quoted *Blackstone* for the proposition that (p. 313)

> "The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation * * * laid on them not only by nature herself, but by their own proper act, in bringing them into the world". (1 Blackstone Commentaries on the Laws of England [11th ed., 1791], pp. 446-447.)

At common law the father of an illegitimate child was under no legal duty to support such child. *Fite* v. *Miller*, 280 App. Div. 12 (4th Dept. 1952). The legal liability of such a father is statutory (Family Court Act, § 513, *supra*).

The support obligation of a father was long ago enunciated by this Court in *Dunbar* v. *Dunbar*, 190 U.S. 340, 351 (1903) where the Court held that "At common law,

a father is bound to support his legitimate children, and the obligation continues during their minority. We may assume this obligation to exist in all the States". And this Court has recently held that a State which posits a judicially enforceable right on behalf of children to needed support, cannot deny such right to an illegitimate child (*Gomez* v. *Perez*, 409 U.S. 535 (1973)), thus securing to *all* children the right of filial support which New York, by statute, his given to them.

In assessing State action restricting parental control of their children, this Court has often held that "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder". *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1943), *Ginberg* v. *New York*, 390 U.S. 629, 639 (1968), *Stanley* v. *Illinois*, 405 U.S. 645, 651 (1972). Implicit in such a declaration of parental rights, is the logical corallary that among the "first" and "primary" duties of parents is the duty of parents to support their children.

The effect of the decision below, in holding New York Social Services Law, § 101-a (2) (3) to be in conflict with requirements prescribed by Congress (J.S. 33), is to *reverse* long-standing principles governing the responsibilities of parents to support their children and to imply to Congress an unexpressed intent to *shift* such preexisting parental responsibilities from parents to the States. We submit that, if Congress had intended such a result "• • • such intentions would in all likelihood have been expressed in direct and unambiguous language. No such expression exists, however, either in the federal statute or in the committee reports" *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405 at 414 (1973).

The federal statute involved is 42 U.S.C. § 602(a) (11), (17), (18), (21) and (22). As will be shown, these provisions were not intended to shift parental responsibility from parents to the States.

On the contrary, the provisions of 42 U.S.C. § 602(a)(7) *require* the States to consider the support obligation of the father to be a resource of the child in determining need in the first instance.

A. The Notice to Law Enforcement Officers (NOLEO) Amendment of 1950 (42 U. S. C. § 602 (a) (11)) did not shift parental support responsibilities from parents to the State.

It was in 1950 that Congress first inserted provisions in the Social Security Act evincing its concern with the problem created by the parent who deserts or abandons his children. The 1950 amendment (60 Stat. 1095) inserted what is now 42 U.S.C. § 602 (a) (11) (formerly § 602[a] (10)) to provide that a State Plan must "effective July 1, 1952, provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid [to families with][7] dependent children in respect of a child who has been deserted or abandoned by a parent."[8]

---

[7] The phrase "Aid to Families with Dependent Children" was substituted for the phrase "Aid to Dependent Children" by Public Law 87-543 of 1962.

[8] Since the NOLEO amendments of 1951 were aimed at prosecuting deserting or abandoning fathers, it is arguable that those amendments were directed toward the situation where a married man deserted his family, not cases involving paternity. Appellee Stuck, the intervenor below, is the only viable appellee before the Court, and her case involves a failure to cooperate in the establishment of the paternity of one of her children and obtaining support for that child. Thus, strictly speaking, 42 U.S.C. 602 (a) (11) has no application whatsoever to the case at bar. As noted in appellant Lavine's Jurisdictional Statement, however, (J.S. pp. 8 and 9), the Court below framed its order in terms of requiring "recipient cooperation in a paternity or support action".

Section 602(a) (11) came to be known as the NOLEO provision (Notice to Law Enforcement Officers).

Senate Report No. 1669 of 1950 (1950 United States Code Congressional Service, p. 3287 at 3345) simply stated:

> *B. Notification to appropriate law-enforcement officials*
>
> "Your committee believes that all instances of desertion and abandonment of children by parents which result in the payment of aid to dependent children should be brought to the attention of the proper law-enforcement officials. The committee-approved bill, therefore, would amend title IV of the Social Security Act by adding the requirement that an approved State plan must provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to dependent children with respect to a child who has been deserted or abandoned by a parent."

House Report No. 1300 of 1950 stated (p. 48):

> *F. Notification to appropriate law enforcement officials*
>
> "It has come to your committee's attention that the number of children receiving aid because of the desertion of the father is increasing. The legal responsibility of a parent for the support of his minor children is, of course, clearly established in the laws of every State. Your committee believes that all instances of desertion and abandonment of children by parents which result in failure to fulfill this responsibility should be brought to the attention of the proper law enforcement officials.
>
> "The bill, therefore, would amend title IV of the Social Security Act by adding a requirement that an approved State plan must provide for prompt notice to appropriate law enforcement officials of the furnishing of aid to dependent children with respect to a child who has been deserted or abandoned by a parent."

"NOLEO" was a product of the times in which it was spawned. Maurine McKeany, in a publication entitled "The Absent Father and Public Policy in the Program of Aid to Dependent Children", University of California Press, 1960, stated (foot notes omitted):

"WHY CONGRESS ADDED THE NOLEO AMENDMENT"

"*Public criticism of ADC.*—Congress added the Noleo requirement in a period during which ADC was being subjected to much public criticism. In the years following World War II, a variety of attacks were made upon this program. The expense of ADC at a time when the nation was enjoying relative prosperity was difficult for many persons to understand. High grants to large families (which were necessary because of increased living costs and which were sometimes higher than the low-paid worker could earn) were the object of adverse criticism. Legislatures in certain states acted to limit the administrative discretion of public welfare agencies by placing ceilings on the amount which any family could receive.

Recipients were accused of 'chiseling' and mismanaging their grants, and public welfare agencies were blamed for inefficient administration of the ADC program. The provision of the Social Security Act limiting the disclosure of information concerning applicants or recipients to purposes directly connected with the administration of public assistance was questioned. Wilbur Cohen has pointed out that the events leading to the passage of the Jenner amendment of 1951, which modified this provision, were touched off by the denial of a request by a county prosecutor in Indiana for a list of persons receiving ADC. The prosecutor asked for this list in order that he might determine whether fathers were obeying the court orders for support of their children. Among the charges repeatedly leveled at ADC was that fathers—both married and unmarried—were permitted by the existence of this program to shift their obligations to the taxpayer." (pp. 41, 42)

• • •

"The Noleo amendment as a compromise measure.— Representative Tom Steed urged the House Ways and Means Committee, which was holding hearings on the social security amendments, to include his bill (H. R. 4057) as an amendment to the Social Security Act. This bill contained two proposals: (1) to make the deserting parent who crosses state lines subject to federal prosecution, and (2) to make it mandatory for welfare workers to advise prosecuting attorneys when a child whose parent has deserted him receives public aid.

Mr. Steed believed that his bill provided a way to enforce the assumption of responsibility by the father without depriving children of needed support. In urging the passing of this bill he said in part: 'In introducing this bill, *I do not intend that aid shall be withheld from any needy child, but rather this bill is aimed at parents, who, without justification, shift the financial responsibility for their children to the federal, state, and local governments.*' Another aim of this bill was to bring about cooperation of law-enforcement officials and welfare agencies. Mr. Steed pointed out that, under the existing law, welfare agencies were prohibited (by the confidentiality provision of the Social Security Act) from notifying prosecutors of cases of desertion or abandonment, and that the wife usually failed to do this.

"The Noleo amendment was the result of a compromise which was presented by Fedele Fauri, then staff adviser to the Committee on Ways and Means. By this compromise, state governments continue to have responsibility for dealing with the offenses of desertion and abandonment, but a state receiving federal funds for ADC is required to develop a plan for prompt notice to the appropriate law-enforcement officials in all cases in which aid is furnished to a child who has been deserted or abandoned by a parent. Wilbur Cohen analyzed the reasons for the adoption of the compromise proposal as follows: 'Congress, in initiating and adopting the amendment, was responding to public opinion and at the same time attempting to work out something constructive without infringing

on state rights or broadening the area of Federal control over family matters or changing the basic principles of the ADC program.'

Thus, the Noleo amendment was the result of the desire to put into effect two public policies—support of needy children and enforcement of the performance of duty by fathers who fail to support. The proponents of this amendment believed that it presented a method by which both of these objectives could be achieved." (pp. 45-46 (Emphasis supplied)

Congressman Steed, in proposing NOLEO did not intend that aid should be withheld from any needy child. But he recognized the inherent wrong involved in parents shifting the burden of support of their children to federal, state and local governments. And we submit that he was referring to *both* parents, not just to the father because prior to 1950 only the child received a grant of aid to dependent children. It was not until 1950 (70 Stat. 850) that the mother was included as a recipient.

On June 11, 1951, the Department of Health, Education and Welfare promulgated, *inter alia*, section 8120 of Part IV of the *Handbook of Public Assistance Administration*.[9]

Section 8120 provided, *inter alia:*

"8120. *Interpretation*

• • •

"Congressional action was clear with regard to the difference between public assistance administration and law enforcement, and did not place upon the public assistance agencies responsibility for enforcing support. The public assistance job is seen as that of providing eligible children with the assistance they need; and it is not the intent of the legislation to deprive

[9] Since codified for the most part in 45 C.F.R. § 235.70 (36 *Federal Register* 33869). Section 235.70 has no application to the case at bar. The new HEW regulation (45 C. F. R. § 233.90 (b) (4) (i) (ii)) specifically so provides.

> needy children of assistance in order to punish their parents for neglect of their duties. Although accepting assistance involves notice to the law-enforcement officials if a parent has deserted or abandoned his child, the amendment does not impose an additional eligibility requirement. This is clear in the wording of the provision which requires notice that *aid has been furnished* 'in respect of a child who has been deserted or abandoned by a parent.'"

And Section 8149 of Part IV of the Handbook of Public Assistance Administration, provided:

> "8149. Legislative Recommendations.—In most instances, States should be able, without changes in State laws, to carry out this requirement of the Federal act by issuing the necessary rules and regulations. The Bureau advises against legislation that makes the actual commencement of action on the part of a parent to obtain support from the parent who has deserted or abandoned his children a condition of eligibility. Such provisions deprive needy children, who would otherwise be eligible, of the right to receive aid to dependent children pending the commencement of action to obtain support from the absent parent."

HEW's interpretation of the NOLEO provision of 1950 is consistent with its recently promulgated regulation (45 C.F.R. § 233.90(b)(4)(i)(ii)) acknowledging the right of the States to refuse to provide maintenance for a parent or caretaker who fails to provide assistance in establishing paternity and in seeking support. This is so because as to the NOLEO amendment HEW had grounded its position (section 8120, *supra*) upon the precise wording of 42 U.S.C. § 602(a)(11).

New York Social Services § 101-a(2)(3) does not deny AFDC to any child. It requires only that the parent perform her natural duty to support and obtain support for her child. That duty is hers, not the State's. The NOLEO amendments of 1950 did not change that "basic concept".

B. The 1967 Amendments to the Social Security Act (42 U. S. C. § 602 (a) (17) (18) (21) (22)) did not shift parental support responsibilities from parents to the State.

The 1967 amendments to the Social Security Act for the first time, in an effort to reduce the incidence of illegitimate births, inserted the provisions of 42 U.S.C. § 602 (a)(15), which provides, *inter alia,* for the development of a program by the States to prevent or reduce the incidence of births out of wedlock and to otherwise strengthen family life (§ 602 [a][15][A][ii]) and for the implementation of such programs by the furnishing of family planning services (*id.* [B][i]).[10]

But there was another side to the coin. The 1967 amendments to the Social Security Act (Section 602[a]) further provided that a State plan must:

> "(17) provide—
>
> (A) for the development and implementation of a program under which the State agency will undertake—
>
> (i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, and
>
> (ii) in the case of any child receiving such aid who has been deserted or abandoned by his parent, to secure support for such child from such parent (or from any other person legally liable for such support), utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support, and * * *."

---

[10] The 1962 amendments to the Social Security Act had placed a new emphasis on family services, and in line with that change, the name of the program was changed to "Aid and Services to Needy Families with Children", and the name of the assistance provided under the program was changed to "Aid to Families with Dependent Children" (thus, AFDC, rather than ADC, as formerly). (Senate Report No. 1589 relating to the public welfare amendments of 1962, 1962 United States Code Congressional and Administrative News, p. 1943 at 1956).

Section 602(a)(17)(B) requires that there be a special administrative unit in each State to establish paternity and obtain support. Section 602(a)(18) requires States to enter into agreements with law enforcement and judicial agencies. Section 602(a)(21) and (22) require States to provide information useful in locating deserting parents and to assist each other in obtaining and enforcing support obligations of such parents. See also 42 U.S.C. § 610.

Senate Report No. 744, 1967 United States Code Congressional and Administrative News, p. 2834 at 2997, stated, in part:

> "A substantial proportion of the persons receiving aid under the AFDC program are eligible because of the desertion by a parent of the child. Several provisions are already in the law and more are proposed under the bill to provide additional tools[11] to States and to impose further obligations on them to assure the determination of legal responsibility for support and to make efforts to make these collections. The committee believes it is essential to make certain that all legally responsible parents of sufficient means make their appropriate contribution to the support of their children."

House Report No. 544 of 1967 dealt with "parental desertion" and "referral to courts".

As to referral to the Courts, the Committee's report stated (p. 100):

> "*Referral to courts*—Your committee's bill would add a plan requirement on the relationship of the public welfare agency to the courts and law enforcement officials. Under present law, the States are required to report to the appropriate law enforcement officials

[11] *Cf. Wyman* v. *James*, 400 U.S. 309 where the challenged regulation conditioning continuation of AFDC benefits on home visits by case workers was deemed to be "a reasonable administrative tool" (400 U.S. 309 at 326).

the granting of assistance to any child who is made eligible by the desertion or abandonment by his parent. *This provision has not been broad enough to accomplish objectives which the committee believes are essential—securing support from the deserting or abandoning parent in every possible case.* There needs to be a cooperative arrangement between the courts and law enforcement officials and the welfare agencies in several program areas. The agreement should cover the manner in which referrals are made to the court when the welfare agency believes the child's home is unsuitable because of neglect, abuse, or exploitation of a child. The agreement should also provide for calling the attention of the law enforcement agencies to such instances and giving all necessary information to the appropriate law enforcement officials. Thus, for example, if an AFDC mother is not caring properly for her children, the matter would quickly come to the attention of the courts and appropriate action taken, including the possibility of placing the children in foster care.

"The agreement might appropriately cover other areas of joint interest between the welfare agencies and the courts and the law enforcement agencies including the manner of referral to the welfare agency of instances of dependency and the need for public social services coming to the attention of the courts and law enforcement officials." (Emphasis supplied)

As to "parental desertion" the report stated (p. 102):

"*Parental desertion.*—In addition to illegitimacy as a major cause of dependency, absence of a parent from the home by desertion is a major problem. To deal with this, your committee is proposing additional requirements on the States to bring about a closer relationship between the welfare agencies and the law enforcement agencies and courts of the States *so that every reasonable effort will be made to locate and obtain support from the absent parent.*

"One of the major factors which has prevented the full utilization of the resources of the law enforcement agencies is the lack of authority for the welfare

agencies to reimburse the law enforcement agencies, with Federal sharing, for their expenses. Your committee is proposing that this weakness be corrected by allowing Federal sharing in the reasonable expenses of the law enforcement agencies with respect to welfare recipients as a usual administrative expense of the welfare program. The committee expects that this expenditure of Federal funds will result in increased effort to enforce the laws against desertion and non-support. The committee also expects of the Department of Health, Education, and Welfare extreme diligence in working out the implementation of this provision to protect the Federal funds and to assure maximum benefit from the money expended. Reimbursement should be limited to the basic expenses for the personnel directly involved in the establishment of paternity, location of deserting parents, and for obtaining support from such individuals. Inasmuch as this is a normal function of Goverment and, thus, should be available to welfare recipients as well as all others in the community, your committee believes that a relatively small Federal contribution toward the cost of this operation should be sufficient.

"The above requirements on the States having to do with establishment of paternity, location, and obtaining support from absent parents will absorb the attention of some full-time staff members of the State and local agencies in many areas. In order to make certain that these functions are executed with diligence and are fully coordinated, the committee bill provides that there shall be a unit established in the State agency and in each political subdivision responsible for these functions. Although in some instances these functions can be carried out by persons also carrying other responsibilities, this requirement will, normally, require staff working in this area full time. A related provision, discussed earlier in this report, would allow courts to use social security earnings records in order to locate a parent who is not supporting his child." (Emphasis supplied.)

Thus the 1967 amendments were intended to help the States and not hinder them in gaining support payments.

One of the proposals advanced by the House during the course of the deliberations on the 1967 amendments to the Social Security Act was to freeze (insofar as Federal financial participation is concerned) the largest AFDC category—where the parent is absent from the home—at then existing proportions of each State's child population. This was added as 42 U. S. C. § 603(d), since repealed (83 Stat. 45). Chairman Wilbur Mills of the House Ways and Means Committee was of the opinion that the freeze "• • • would give the States an additional incentive to make effective use of the constructive programs which the bill would establish" (Congressional Record, House, August 17, 1967, p. 23055).[12]

The freeze provided by § 603[d] was ultimately repealed because of unexpected effects arising from its application in light of the Court's decisions in *Shapiro* v. *Thompson*, 394 U. S. 618 (1969) and *King* v. *Smith*, 392 U. S. 309 (1968) which would have led to the exclusion from Federal matching of great numbers of persons whom it was not the intent of Congress to exclude. See Senate Report No. 91-223 of 1969 concerning "Chicory Roots—Suspension of Duty—Social Security", 1969 United States Code Congressional and Administrative News, pp. 1051 through 1055, inclusive.[13]

---

[12] For the remarks of Representative Mills in presenting the conference report, see 1967 Congressional Record, House, pp. 36366, 36367 and 36368.

[13] That report which was presented to the Court in Commissioner Lavine's reply brief in the *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405 (1973) clearly indicated that during the course of negotiations on the repeal of section 603(d) it was anticipated that action by this Court in *Shapiro* v. *Thompson* and *King* v. *Smith* would be on constitutional grounds and that the members of Congress did not anticipate that *King* v. *Smith* would be decided on statutory rather than constitutional groudns (*id.* p. 1054).

The House debate on the 1967 amendments appears at 1967 Congressional Record—House, p. 23048, *et seq.* That debate clearly shows that the House was seriously concerned with the problem of the father who had abandoned the home and was not supporting his dependents. This was made clear from the remarks of Representative Byrnes of Wisconsin which show that the "freeze" was aimed at situations where the father has left the home. He stated (1967 Congressional Record—House, p. 23059):

> "The only qualification or limitation applies to situations where in some instances the father has abandoned the home—left the home—and is not taking care of his dependents. That is where we place the limitation, because that is where the growth and the problem lies.
>
> "In my opinion the evidence which was presented before the Committee on Ways and Means was perfectly clear to the effect that there has not been any effort to find these parents in far too many cases, to find these fathers in far too many cases, who have abandoned the support of their children.
>
> "In other words, Mr. Chairman, we have got to put some teeth into this situation in order to force the States to see that these fathers bear the burden of supporting their own children. That is the only area in which we have placed any limitation upon this particular part of this legislation."

Thus it is apparent that the "freeze" was intended to apply the "crunch" to the States to force them to do something about obtaining support, not to hinder them in seeking support from deserting or abandoning parents.

Mr. Byrnes' remarks clearly constituted a call to action by the States to find the deserting or abandoning parent and are consistent with and not a limitation upon the States' power to require that a parent assist in proceedings against an abandoning or deserting parent, especially so where, as

here, only the parents or caretaker relatives' grant is involved.

Senator Long, who was apparently the floor manager of the 1967 Social Security Bill in the Senate, stated that the amendments "would make more certain the fullfillment of parental responsibilities." He further noted:

> "• • • a requirement to assure that fathers who desert or abandon their families will contribute to the support of their families by using available tax records and the tax collecting and enforcement power of the Internal Revenue Service [not adopted (sic)]. This is a matter in which I have been particularly interested. In addition, there would be a requirement that the States establish separate units to enforce the child-support laws, including financial help to the courts and prosecuting agencies to enforce court orders for support;" (1967 Congressional Record, Senate, p. 32592).

Senator Long further stated (1967 Congressional Record, Senate, p. 32593):

> "Because of the constructive provisions of the bill, particularly those relating to the work-incentive program, family planning, and parental support, the committee has stricken from the House bill the provision which would impose a limitation, for Federal financial participation purposes, on the number of children whose eligibility is based upon the absence from the home of a parent. **The committee believes that these other provisions will do what the House had in mind without running the risk of depriving needy children** of the assistance they require."[14]

Senator Curtis in his statement said "Also, the State can do a better job if it enforces the law and requires deserting fathers to support their children." As to the freeze, he stated:

---

[14] The "freeze" was restored after conference with the managers for the House.

"I would point out that if a State is adversely affected by this freeze it can readjust its eligibility requirements so it can provide for the more needy cases." (1967 Congressional Record, Senate, p. 36319.)

Senator Ribicoff's statement was as follows:

"RELATIONSHIP TO LAW ENFORCEMENT AGENCIES

"There are several provisions in the bill on the relationships of public welfare programs to the law-enforcement agencies. These provisions are designed to secure the legal rights of children by establishing paternity, in all instances of children born out of wedlock, and making sure that the law-enforcement people are informed of all instances of expected exploitation or neglect of children, and to enlist the total support of law-enforcement officials in the location of absent parents and the collection of support orders. To assist in the effective implementation of these provisions, the State welfare departments are directed to meet part of the cost of the State law-enforcement function that relate to services to needy children. The committee bill contains a unique provision to aid in the location of deserting parents and in the collection of the amounts due their children. Welfare agencies are to have the use of information in the files of the Internal Revenue Service in the location of absent parents, in addition to the resources they now have of the social security files. There may be some persons who owe support to their children who have the ability to pay the required sums and who have refused to do so. In those instances, the Internal Revenue Service is directed to proceed against the individual as though he had a tax obligation which he has not paid and to collect the sums due. (Not adopted [sic].) We do not expect that very many cases will reach this point. We expect that the very existence of this provision and the knowledge of its possible use will help to bring about support from persons who are obligated to pay and that the actual collection machinery will be used only rarely." (1967 Congressional Record, Senate, p. 32851.)

Senator Mansfield's remarks, appearing at 1967 Congressional Record, p. 36925, were as follows:

"STRENGTHENING FAMILY LIFE

"Strengthening family life, the other major goal of individual planning, is very much needed. The growing incidence of illegitimacy, desertion, and divorce is of great concern to all Americans. Among the needy, those with limited education and poor parental background, these problems are especially severe.

"The unfortunate children who happen to be illegitimate must never be punished. Every effort should be made to obtain support from their parents. Only too often these steps are not taken. If the children have been deserted, every effort must be taken, under this bill, to use the existing legal machinery to locate the absconding individual and hold him accountable for the money he should pay for the support of his children.

• • •"

Also set out is colloquy between Senator Kennedy of New York and Senator Long as follows:

"Am I correct in my understanding that the intent of the new section 402(a) (17) of the law is to indicate Congress concern that, wherever possible, paternity of children should be established and support obtained from the father?

"Mr. LONG of Louisiana. The Senator is correct.

"Mr. KENNEDY of New York. Am I correct that based on my reading of the bill and the committee report, that the committee does not intend by this new paragraph 17 that establishment of paternity is a prerequisite for obtaining AFDC?

"Mr. LONG of Louisiana. The Senator is correct. It is a purpose of the provision of our bill just as it was the purpose of the provision in the House bill, that the State agency should seek to obtain support from a father who has abandoned his children and left them on welfare.

"I have been inclined to think perhaps the State might require it, not as a condition of aid to the child, but as a condition of paternity and the mother identifying as the mother; but there is nothing in the bill to say that. We are talking about the House language of the bill. This is not the Senate language.

"Mr. KENNEDY of New York. We are establishing that, during the period of time the effort is being made to establish the paternity of the child, the child will not lose the welfare payment.

"Mr. LONG of Louisiana. So far as I know, there is nothing in the bill to suggest that." (1967 Congressional Record, Senate, p. 33540.)

Senator Long in his statement in support of the conference report stated as to the freeze:

"The freeze applies not to the entire AFDC population, but only to those whose parent is absent from the home. It seeks to take the incentive out of illegitimacy, or out of a father's running away from his obligations to his children." (1967 Congressional Record, Senate, p. 36306.)

The State and Federal Governments have a common concern requiring deserting or abandoning parents to support their children. Clearly, neither the provisions of 42 U.S.C. § 602(a) (17) (18) (21) and (22) nor their legislative history limit the rights of the States to seek support for dependent children by enlisting the participation of the parent or caretaker relative.

42 U.S.C. § 602 (a) (18) (20) and (21) provide aids to the States in developing and implementing State programs required by the provisions of 42 U.S.C. § 602 (a) (17) (A). 42 U.S.C. § 602 (a) (17) (A) requires the States to develop and implement programs (a) to establish paternity for children born out of wedlock and to secure their support and (b) to secure support for deserted or abandoned children.

This is precisely what New York Social Services Law, § 101-a(2) (3) does.

The provisions of the Act do not, however, shift the parents' duty of supporting their children to the State. Rather they are recognition of the existence of that duty and amount to instruction to the States to enforce it.

C. 42 U.S.C. § 602 (a) (7) requires that the States in determining need take into consideration the income and resources of a child or relative claiming AFDC. In fulfilling such requirement, the State must take into account "any" income and resources. The provisions of section 602 (a) (7) did not shift parental support responsibilities from parents to the State. On the contrary, such provisions are recognition of such responsibilities and place them upon the parents where they belong.

We have demonstrated that New York Social Services Law § 101-a(2) (3) furthers "basic concepts" pertaining to parental support obligations and specific provisions of the Social Security Act relating to the establishment of paternity and the obtaining of support which are recognition of such "basic concepts". But there exists another requirement in the Social Security Act which, we submit, amounts to recognition of the duty of parental support, and which virtually mandates that the States enlist the aid of the parent or caretaker relative to obtain support from a deserting or abandoning parent.

42 U.S.C. § 602(a) (7) provides that a State plan must:

> "(7) • • • provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;".

When AFDC was first inserted in the Social Security Act in 1935 (49 Stat. 627) the statute contained no method for determining the existence of "need".

The 1939 amendments to the Social Security Act sought to cure this deficiency by inserting parallel amendments in the Old Age Assistance Program (Title I), the Aid to the Blind Program (Title X) and the Aid to Dependent Children Program (Title IV).

House Report No. 728, relating to the Social Security Act of 1939 stated:

> "The purpose of all three assistance programs is further clarified by inserting the word 'needy' in the definitions of those who may receive old-age assistance, aid to the blind, or aid to dependent children. A closely related clarifying amendment is applied to all three assistance titles and provides that the States, in determining need, must consider any other income and resources of individuals claiming assistance." (*id.* p. 29, also Senate Report No. 734, p. 31)

The "closely related clarifying amendment" which was the precursor of the present-day's 42 U.S.C. § 602 (a) (7), was the subject of specific comment in the Reports. The reason for the insertion of the "clarifying amendment" in all three titles is to be found in the explanation of the amendments to the old age assistance provisions of the Social Security Act (Title I). The House Report states (p. 32):

> "The present subject matter of clause (7) is stricken from section 2 (a) by the amendment and is treated in section 102 of the bill. The amended clause (7) is effective July 1, 1941. Under this clause the State plan must provide that the State agency *shall*, in determining need, take into consideration any income and resources of an individual claiming old-age assistance. This will make it clear that, ***regardless of its nature or source, any income or resources will have to be con-***

sidered, including ordinary income from business or private sources. Federal benefit insurance payments under title II of the Social Security Act, *and any other assets or means of support. The committee recommends this change to provide greater assurance that the limited amounts available for old-age assistance in the States will be distributed only among those actually in need and on as equitable a basis as possible.*" (Emphasis supplied.) Also Senate Report No. 734, p. 39.

The specific amendment to section 602 (a) (7) relating to AFDC was explained at pages 55 and 56 of the House report in the following terms:

> "Section 401 (b) adds a new clause, [to section 402 (a)] numbered (7), which becomes effective July 1, 1941. Under this clause the State plan must provide that the State agency *shall*, in determining need, take into consideration any income and resources of any child claiming aid under this title. It also adds a new clause, numbered (8) effective July 1, 1941, which requires that the State plan must provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of aid to dependent children. These new provisions are similar to those added to title I of the Social Security Act by section 101 of the bill." (Emphasis supplied.) Also Senate Report No. 734, p. 66.

Section 602 (a) (7) as added by the 1939 amendments read that a State plan must "(7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child claiming aid to dependent children".[15]

---

[15] It was not until 1962 that relatives were added as persons whose income and resources were required to be considered. Also in 1962 provision was first made for the consideration of expenses reasonably attributable to the earning of income. Apparently the States had been considering all income of relatives without provision in the law. See 1962 U.S. *Code, Congressional Administrative News*, p. 1943, at 1959.

The Senate and House Reports of 1939 expressly stated that "regardless of its nature or source, any income or resources *will have to be considered*" (emphasis supplied), in order to assure that the limited amounts available for assistance payments in the States, "will be distributed only among those actually in need and on as equitable a basis as possible."

In our Jurisdictional Statement, we argued that "limited State welfare funds should be permanently expended only on behalf of those truly in need" (J.S., p. 17). That position clearly comports with what Congress had in mind when it was said that State moneys should be distributed only among those actually in need and on as equitable a basis as possible.

In 1939, the relative was not a recipient of AFDC, but only the child. We submit that the principal resource available to a child was the right of that child given to him by State law to be maintained and supported by his parents.

The State is duty-bound by the provisions of 42 U.S.C. § 602 (a) (7) to determine the existence of need, and, as stated in the House and Senate Reports, assure that assistance "will be distributed only among those actually in need and on as equitable a basis as possible." Where the applicant or recipient of AFDC fails to disclose facts about her needs and resources within her knowledge, or to provide such information as will enable the local social services agency to ascertain and verify her needs and resources, it is not possible to determine whether she and her children are actually in need. To hold otherwise would require the local social services agency to determine the basic question of "need" in the applicant's or recipient's favor where the information crucial to that determination, the applicant's needs and resources, is not available to the agency. In ef-

fect, the local agencies would be required to make a gift of public funds. Appellee Stuck may not place such demands upon the public treasury (*Wyman* v. *James*, 400 U.S. 309, 322 [1971]).

The obtaining of such information is the only practical means of complying with the provisions of 42 U.S.C. § 602 (a) (7) and of administering the program. See *Saiz* v. *Hernandez*, 340 F. Supp. 165, 167 (D. New Mexico [1972] [MECHEM, J.]).[16]

In *Doe* v. *Shapiro*, 302 F. Supp. 761 (D.C. Conn. [1969]), app. dismissed 396 U. S. 488 [1970] (for late docketing), rehearing den. 397 U.S. 970 [1970], the child, as well as the parent, was denied public assistance for the failure of the mother to cooperate. The remarks of District Judge CLARIE, in dissent, have particular cogency in the context of the case at bar where assistance payments are denied only to the uncooperative mother but not to the child. Judge CLARIE said (302 F. Supp. 761, at 768):

> "The focal statutory provision which has application here is § 602(a) (7); it reads in part:

---

[16] This Court has recognized that a State AFDC plan "must 'provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid'". *Wyman* v. *James*, 400 U.S. 309 at p. 315 (1971). The home visitation by a social worker upheld in that case would further compliance with the provisions of 42 U.S.C. § 602(a)(7).

As to the requirements of section 602(a)(7), a three-judge District Court in *Doe* v. *Norton*, 365 F. Supp. 65 (D.C. Conn., 1973) app. pend. stated (p. 80):

> "The defendant public official, who administers the laws under which welfare assistance is given to these plaintiffs, is not only authorized, but *required*, to proceed under the statute in order to establish the primary obligation of the father to support his child as one of the 'resources' which the state is entitled to consider in ascertaining the plaintiffs' eligibility for AFDC benefits. See 42 U. S.C. § 602(a)(7)." (Emphasis supplied.)

'(A State plan for aid and services to needy families with children must) * * * provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.'

It is fundamental in this statutory scheme, that the sources of all family income be disclosed as a prerequisite to an applicant's qualifying for eligibility benefits. Thus the mother's disclosure of the known identity of a legally liable putative father is certainly an essential element in correctly evaluating the applicant-mother's support capabilities, as stated on the application in behalf of herself and her dependent children. Her limited disclosure of actual current income is incomplete, if any of the available sources remain unrevealed.

She is the actual party plaintiff in this action; it is to her that the government welfare benefits are directly paid. It is through her, that the family unit is sought to be preserved, as an essential unit of our society. She is the actual recipient of these moneys as head of the household. *It is the plan and expectation, that her maternal interest as natural parent and guardian will assure to the dependent child the full benefits of the government allotment.*

Unless the principle of personal parental responsibility is to be abandoned, as an obsolete cornerstone for gauging welfare eligibility, a full disclosure is a necessary and implied governmental prerogative, which requires the applicant to disclose all relevant information. Absent this personal responsibility and cooperativeness between the applicant-mother and the government, the effectiveness of the program would be seriously challenged because she is the sole source of this information; and without it the system designed to establish paternity could not function. See James v. Goldberg, D.C., 302 F.Supp 478 (June 13, 1969)". (Emphasis supplied)

Judge CLARIE's comments bring into vivid focus the proper role of 42 U.S.C. § 602 (a) (7) in the case at bar. The State, in determining eligibility, is clearly required to consider support payments as a resource. New York does not assume that since a parental duty of support exists, the support payments are in fact available to the mother (*cf. King* v. *Smith*, 392 U.S. 309 (1968) and *Lewis* v. *Martin*, 397 U.S. 552 (1970). It does insist, however, that the mother assist and cooperate in the realization of the resource which the legal obligation of the natural parent to support his child creates. The failure of the parent to cooperate in the converting of the support obligation to cash to be used in reducing the cost of assistance, thus, permitting the State to more equitably distribute its limited public assistance funds, is justification for the discontinuance of AFDC to the parent. To hold otherwise is to vest the administration of the State AFDC program in the uncooperative parent rather than in the State agency and to shift pre-existing parental support responsibilities from parents to the States contrary to the express provisions of 42 U.S.C. § 602 (a) (7).

POINT II

New York Social Services Law § 101-a (2) (3) operates within the legitimate sphere of State AFDC administration and serves legitimate State purposes. The State statute is valid even if it is held to create a condition for assistance.

A

We have thus far argued that New York Social Services Law § 101-a (2) (3) is in harmony with and furthers the provisions of the Social Security Act and that thus the State statute does not create a condition of eligibility.

But whether Section 101-a (2) (3) is found to create a condition of eligibility or not is irrelevant to the case at bar. This Court has held that "so long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act the courts may not void them". *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405 at p. 423 citing *Jefferson* v. *Hackney*, 406 U.S. 535 at 545 (1972). New York's requirement of parental cooperation does not violate any specific provision of the United States Constitution or of the Social Security Act. Rather it operates "within the legitimate sphere of state administration" (*Dublino*, 413 U.S. at p. 422) and is thus proper in any event.

Prior to this Court's decision in *Dublino*, the Court had summarily affirmed three District Court decisions in which AFDC was denied to mothers *and* their children for the failure of the mother to cooperate. These are *Taylor* v. *Martin*, 330 F. Supp. 85 (U.S.D.C., N.D. Calif. 1971), affd. *sub nom.*; *Carleson* v. *Taylor*, 404 U.S. 980 (1971); *Meyers* v. *Juras*, 327 F. Supp. 759 (D.Or., 1971) affd. 404 U.S. 803 (1971), reh. den. 404 U.S. 961 and *Doe* v. *Swank*, 332 F. Supp. 61 (N.D. Ill., 1971) affd. *sub nom. Weaver* v. *Doe*, 404 U.S. 987 (1971). In each of the cited cases, attempts had been made to deny AFDC benefits not only to uncooperative mothers, but to their children as well. The Court's summary affirmances appear to have been grounded upon the holding of *King* v. *Smith*, 392 U.S. 309 (1968) that the appeal in that case raised "* * * only the question whether the State may deal with * * * problems * * * *by flatly denying* AFDC assistance to otherwise eligible dependent children." (p. 320) (Emphasis supplied.)

It is also possible that decision in those cases was premised upon the specific provision of 42 U. S. C. § 602 (a) (11), the original NOLEO provision, which had been con-

strued by HEW to expressly preclude the denial of assistance to the child.

Where efforts were made by the States to discontinue only the mother's grant, but not the children's, for her failure to cooperate in obtaining support from the father of her children, the Courts held such efforts to be unauthorized. Thus, in *Doe* v. *Harder*, 310 F. Supp. 302 (D.C. Conn., 1970), app. dis. for want of jurisdiction, 399 U.S. 902 (1970). The District Court in Connecticut had before it a regulation of the State of Connecticut which had been amended to provide for termination of AFDC payments to the mother rather than to the children if the mother refused to name the child's father.[17]

The Court held (p. 303):

> "This regulation, while in form directed at the mother rather than the child, has the same vice as the original. It reduces the assistance to the family by creating an additional eligibility requirement identical to that held invalid and not authorized by the federal statute."

Other Courts followed the lead of the *Harder* Court and invalidated similar requirements in other States. See *Woods* v. *Miller*, 318 F. Supp. 510 (W.D. Pa. 1970); *Doe* v. *Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972) and *Doe* v. *Gillman*, 347 F. Supp. 482 (N.D. Iowa, 1972) modified 479 F. 2d 646 (8th Cir. 1973) petition for certiorari pending *sub nom.*, *Burns* v. *Doe*, No. 73-406.

The Court below, the *Harder* Court and those decisions which followed its teaching failed to recognize that regu-

---

[17] In *Doe* v. *Shapiro*, 302 F. Supp. 761 (D.C. Conn. (1969)), app. dis. 396 U.S. 488, reh. den., 397 U.S. 970 (1970) the Connecticut Court had enjoined the operation of a State regulation providing for termination of payments to an illegitimate child if the mother refused to name the child's father. Connecticut then sought to withhold assistance only from the mother.

lations promulgated within the legitimate sphere of State administration are valid (*Dublino*, 413 U.S. at p. 22) so long as "they are not in violation of any specific provision of the Constitution or the Social Security Act" (*Dublino*, p. 423, footnote 29, *Jefferson* v. *Hackney*, 406 U.S. 535 at 541 (1972)). Nor did the Courts take into account the instruction of *Wyman* v. *James*, 400 U.S. 309 (1971) or *Charleston v. Wohlgemuth*, 332 F. Supp. 1175 (D.C. Penn. 1971) affd. 405 U.S. 970 (1972).

In *Wyman* v. *James*[18] this Court recognized that AFDC could be denied to a family unit for failure of the mother to permit a home visit by a social worker. The Court noted that the choice was entirely up to the welfare mother (400 U.S. at 324) and stated (400 U.S. at 325):

> "The only consequence of her refusal is that payment of benefits ceases. Important and serious as this is, the situation is no different than if she had exercised a similar negative choice initially and refrained from applying for AFDC benefits".

On March 6, 1972, the Court summarily affirmed *Charleston* v. *Wohlgemuth*, 405 U.S. 970 affg. 332 F. Supp. 1175 (D.C. Penn., 1971) in which the Court sustained a decision of a three-judge Court that regulations requiring AFDC applicants who owned certain types of real or personal property to agree as a condition of receiving assistance, to reimburse the Commonwealth for assistance received and to give a lien on the property as security did not conflict with the Federal Social Security Act. The Pennsylvania District Court had expressly stated that "The duty to execute the forms rests with the adults; the denial of benefits extends to the entire family unit" (p. 1181).

---

[18] The home visitation requirement involved in *James* was held to be "within the legitimate sphere of State administration" *Dublino* (413 U.S. at 422).

So long as State action is within the "legitimate sphere of State administration" (*Dublino*, p. 422) there is no impediment to the State's denial of assistance to a family unit inclusive of the mother. NOLEO cases by reason of the express provisions of 42 U.S.C. § 602(a)(11) appear to preclude denial of assistance to the child but that statute does not operate for the benefit of the mother whose grant may be withheld.

True it is that the denial of assistance to the uncooperative mother as a practical matter operates to reduce the total grant of assistance to the family. There is, we submit, no "vice" involved in such result so long as the choice in bringing that result about rests upon the mother and not upon the State.[19]

B

New York, as well as the Congress, has a legitimate interest in obtaining support for deserted or abandoned children. The New York State Department of Social Services in a report entitled "Characteristics of A.D.C. Families in New York State, January 1971", dated September, 1972, based upon a sampling, found that in regular AFDC households[20] in 29% of the cases the father

[19] The Court below referred to House Report No. 1300 relating to the 1950 amendment of 42 U.S.C. § 606(b) as recognizing "the interdependency of provisions for and to the child and its caretaker mother" (J.S. 27) That "interdependency" is irrelevant to the case at bar in which the mother seeks to obtain AFDC "upon her own informational terms" (*Wyman* v. *James*, 400 U.S. at 321). In any event, it appears that the principal purpose of the 1950 amendment was to enable States which had been making provision for adult relatives to make payments "that are more nearly adequate" and to include such a relative "as a recipient for Federal matching purposes" (House Report No. 1300 of 1950, pp. 45-46).

[20] Not including ADC-U households where the father is not employed and is in the home. (New York's program is designated "ADC" rather than "AFDC")

had deserted the family, while in 28.9% of the cases the father was not married to the mother. These figures have been updated to January of 1973 and show that the desertion figure remained constant at 29% of the cases while the category of "father not married to mother" had increased to 42.4% of the cases.[21]

The 1972 report had stated: "Statewide, the place of residence of living ADC Regular fathers was not known to the caseworker in 56% of the cases; in 12% of the cases, the father was either in the home or in an institution, and in the remaining 32% the father's place of residence was outside the home or institution but known to the caseworker." The 1973 update closely parallels the 1971 figures.

It is estimated by the New York State Department of Social Services that the cost of the AFDC program to New York State for fiscal year 1974-75 will be in excess of $358 million. The cost of the program to the 64 local Social Service districts of the State will be approximately equal to the State figure with the Federal contribution amounting to approximately the combined total of the State and local expenditures. New York's interest in exploring and utilizing every possible means of obtaining support from such fathers is very real indeed.

This Court in *New York State Department of Social Services* v. *Dublino*, 413 U. S. 405 (1973) recognized that there are areas within the AFDC Program that are basic to that Program and in which a State as well as Congress has legitimate interests and that the "Court should not lightly interfere" where the State is attemping to assure

[21] The January 1973 figure included all ADC households including those in which an unemployed father is in the home.

that limited State welfare funds will be spent on behalf of those genuinely incapacitated and most in need or where the State is attempting to copy with fiscal hardships (413 U. S. at p. 413).

Congress inserted certain provisions in the Social Security Act in 1967 intended to aid the States in obtaining support from deserting and abandoning parents, but those additions (section 602-a[18][21] and [22]) did not, we submit, establish an "exclusive mechanism" for obtaining support from deserting and abandoning parents (413 U. S. at p. 411, footnote 9). If Congress had intended to establish an "exclusive mechanism" for obtaining support payments such "• • • intentions would in all likelihood have been expressed in direct and unambiguous language. No such expression exists, however, either in the federal statute or in the committee reports." (413 U. S. at p. 414.) Here no less than in *Dublino*, the act clearly "allows for complementary" programs and procedures to obtain support from a deserting or abandoning parent "even if they become conditions for continued assistance" (413 U. S. at p 422) or for any assistance.

CONCLUSION

The order appealed from should be reversed and New York Social Services Law, § 101-a (2) (3) should be declared valid and constitutional in all respects.

Dated: July 15, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York

RUTH KESSLER TOCH
Solicitor General of the State of New York

ALAN W. RUBENSTEIN
Principal Attorney, State of New York

of Counsel

APPENDIX A

Statutes of the United States

"42 U.S.C. § 602*

"(a) A State plan for aid and services to needy families with children must

• • •

"(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;

• • •

"(11) effective July 1, 1952, provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to families with dependent children in respect of a child who has been deserted or abandoned by a parent;

• • •

"(17) provide—

"(A) for the development and implementation of a program under which the State agency will undertake—

(i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, and

(ii) in the case of any child receiving such aid who has been deserted or abandoned by his parent, to secure support for such child from such parent (or from any other person legally liable for such

* 1973 pocket part, page 106 *et seq.*

support), utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support, and

"(B) for the establishment of a single organizational unit in the State agency or local agency administering the State plan in each political subdivision which will be responsible for the administration of the program referred to in clause (A);

"(18) provide for entering into cooperative arrangements with appropriate courts and law enforcement officials (A) to assist the State agency in administering the program referred to in clause (17)(A), including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and (B) with respect to any other matters of common concern to such courts or officials and the State agency or local agency administering the State plan;

• • •

"(21) provide that the State agency will report to the Secretary, at such times (not less often than once each calendar quarter) and in such manner as the Secretary may prescribe—

"(A) the name, and social security account number, if known, of each parent of a dependent child or children with respect to whom aid is being provided under the State plan—

(i) against whom an order for the support and maintenance of such child or children has been issued by a court of competent jurisdiction but who is not making payments in compliance or partial compliance with such order, or against whom a petition for such an order has been filed in a court having jurisdiction to receive such petition, and

(ii) whom it has been unable to locate after requesting and utilizing information included in the files of the Department of Health, Education, and Welfare maintained pursuant to section 405 of this title,

"(B) the last known address of such parent and any information it has with respect to the date on which such parent could last be located at such address, and

"(C) such other information as the Secretary may specify to assist in carrying out the provisions of section 610 of this title;

"(22) provide that the State agency will, in accordance with standards prescribed by the Secretary, cooperate with the State agency administering or supervising the administration of the plan of another State under this part—

"(A) in locating a parent residing in such State (whether or not permanently) against whom a petition has been filed in a court of competent jurisdiction of such other State for the support and maintenance of a child or children of such parent with respect to whom aid is being provided under the plan of such other State, and

"(B) in securing compliance or good faith partial compliance by a parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of a child or children of such parent with respect to whom aid is being provided under the plan of such other State;"

APPENDIX B

Brief in the District Court Concerning "Substantiality"

POINT I

PLAINTIFFS DO NOT RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

In what is an apparent recognition of the insubstantiality of their constitutional argument, plaintiffs have set such claim out as the second cause of action in their amended complaint while devoting the first cause of action to the pendent statutory question thus putting the cart before the horse. Of a certainty, however, it may be said that in the absence of a substantial constitutional claim this Court lacks jurisdiction to entertain this action (see Point II *infra*).*

Plaintiffs' equal protection argument, as set forth at page 9 of the complaint, is that:

> "Defendants' action in erecting an additional requirement of eligibility constitutes a denial of equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that it creates an invidious and unjustifiable distinction. New York's action in this case requires that impoverished mothers institute and cooperate in proceedings against their children's fathers; no such requirement is imposed on the well-to-do. Marriages of the well-to-do are not driven asunder by forcing one spouse to prosecute another. Classifications based on wealth have long been recognized as peculiarly obnoxious to the principles of equality enshrined in the Fourteenth Amendment."

---

* It is at least questionable whether the Federal Constitution may be utilized to permit a mother to force an agency to provide her and her children with public assistance upon her own terms. *Cf. Wyman* v. *James*, 400 U.S. 309, at 321, 322 (1971).

Appendix B—Brief in the District Court Concerning "Substantiality"

The lack of substantiality of plaintiffs' constitutional contention will be demonstrated.

There is no compelling State interest which requires that the so-called "well-to-do" proceed against their children's fathers for support so long as such support is not required for their maintenance. The compelling State interest begins to appear when the child or mother is liable to become in need of public assistance or care (New York Family Court Act, § 415) or has been granted public assistance or care. The distinction here, if indeed there exists one, is entirely rational.

Plaintiffs further seek to show a "distinction" by claiming that "Marriages of the well-to-do are not driven asunder by forcing one spouse to prosecute another." Intervenor Stuck is the only party to this action who has made any factual allegations in the amended complaint. These, however, do not refer to a non-support action, but rather to determining the paternity of her youngest child, a state of facts which obviously does not arise out of a marital relationship. She lacks standing to make such an argument (*Cf.* following, *Doe* v. *Ellis*, 350 F. Supp. 375 [D.C. South Carolina, August 23, 1972]) and none of the named plaintiffs have made any factual allegations in the amended complaint in support of such an argument. While noting this fact, we point out, as to married plaintiffs, that implicit in their argument is the assumption that it is perfectly all right for the man to move out of the house for the purpose of gaining AFDC for his family. To say that the marriage is not already "asunder" would be to imply a fraudulent motive to the plaintiffs and to the fathers of their children. Plaintiffs' argument is specious on its face.

Appendix B—Brief in the District Court Concerning "Substantiality"

Plaintiffs' third attempt to establish a "distinction" is based on an argument that "Classifications based on wealth have long been recognized as peculiarly obnoxious • • •." Of course, this ground of attack must draw its viability from plaintiffs' other two alleged grounds of "distinction". Since those grounds are without viability perforce the entire argument falls in.

We are not dealing with a requirement that a criminal work off a sentence at the rate of $5 per day as in *Williams* v. *Illinois*, 399 U.S. 235, or a case in which some criminals are afforded a stenographic transcript of trial proceedings where others are not as in *Griffin* v. *Illinois*, 351 U.S. 12 (1955), or a case where a thief was subject to sterilization but an embezzler was not, as in *Skinner* v. *Oklahoma*, 316 U.S. 527, all cited by plaintiffs in their brief in the original case as support for their position. Rather, we are dealing with a classification which the Supreme Court of the United States itself has recognized, *i.e.*, "the poor and the needy" (*Jefferson* v. *Hackney*, 406 U.S. 535, at page 546).•

Plaintiffs have not presented a substantial constitutional argument.

As will be shown, Social Services Law, § 101-a(2)(3) serves a compelling State interest and has a rational basis.

• Cf. *Lascaris* v. *New York State Department of Social Services et al.*, 67 Misc. 2d 17, (Supreme Court, Special Term, Onondaga County, 1971) where the Court said (p. 22):

> "There would indeed be a 'double standard' if the mother acting under the terms of the Domestic Relations Law was required to make disclosure in order to get the assistance of the law, while the applicant for public assistance was required to give no information to help locate the father, and would still get the full benefit of the law."

Appendix B—Brief in the District Court Concerning "Substantiality"

The standard for distinctions made in allotting finite state public assistance payments is whether the classification created has a rational basis. In *Dandridge v. Williams*, 397 U.S. 471 (1970), the Supreme Court stated (397 U.S. at 485):

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 229 U.S. 61, 78. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical it may be and unscientific' *Metropolis Theater Co.* v. *City of Chicago*, 228 U.S. 61, 69-70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland*, 366 U.S. 420, 426."

In *Jefferson* v. *Hackney*, 406 U.S. 535 (1972), the Supreme Court reaffirmed this standard and added (406 U.S. at 546-47):

> "A legislature may address a problem 'one step at at a time', or even 'select one phase of one field and apply a remedy there, neglecting the others' • • •"
>
> • • •
>
> "So long as its judgments are rational and not invidious, the legislature's efforts to tackle the problems of the poor and the needy are not subject to a constitutional straitjacket. The very complexity of the problems suggests that there will be more than one constitutionally permissible method of solving them."

See also *Hagans* v. *Wyman*, 471 F. 2d 347 (2d Cir., January 8, 1973) pet. cert. pending, where the Court said:

> "However it is not for us to evaluate the wisdom of of the states' choice of means. If these means are rationally related to a proper end • • • we have no power to go further." (p. 350)

One cannot deny the compelling interest of the State in enacting Social Services Law, § 101-a(2)(3) or the fact that it is reasonably calculated to accomplish the purpose of requiring legally responsible parents to support their dependents and to ease the State's burden in this regard.

Judge GURFEIN, writing in *Doe* v. *Lavine*, 347 F. Supp. 357, 362 (S.D.N.Y., 1972), although finding for the plaintiffs on statutory grounds in another NOLEO* case based upon different provisions of law, could not deny that "• • • It seems quite logical to pursue every means of requiring a putative father to support his child out of wedlock as a means of cutting the relief rolls • • •".

Judge BRIEANT in *Lewis* v. *Lavine*, ____ F. Supp. ____ (S.D.N.Y., December 20, 1972) in granting preliminary relief in a NOLEO case involving Social Services Law, § 101-a stated:

> "It would seem self-evident that a welfare recipient who has an estranged husband who has abandoned her support and the support of the children, or a father of her child, whose name she refuses to disclose, may thereby have financial resources the existence of which prevents her eligibility. She receives assistance on her own behalf, as well as in behalf of the child for whom she cares, 42 U.S.C. §§ 601, 606(b). Needs are

* Notice to Law Enforcement Officers.

the basis for public assistance, and relate to financial resources potentially available to the applicant from any source, including the obligation of a responsible relative, such as the father of a child, legitimate or otherwise. 42 U.S.C. § 602(a)(7).

"Such financial resources of a welfare applicant cannot be found, under the circumstances of this case, without the cooperation and assistance of the mother. The State of New York has a very real interest in fastening financial responsibility on the missing father. In New York City alone in 1971 there were 16,622 out of wedlock births to AFDC recipients. An estimated 70% of all children born to AFDC recipients are born out of wedlock (New York Times, March 21, 1972, p. 31, col. 1).

"It seems monstrous that the state officials, who are expending state resources as well as federal resources, are unable to fasten responsibility upon such persons, and they will be unable unless they can compel the recipient to cooperate and disclose the necessary information."

Indeed, the Social Security Act itself requires the State agency in determining need to take into consideration any other income and resources of any child or relative claiming aid to families with dependent children. See 42 U.S.C. § 602(a)(7).

That the statute has a rational basis and serves a compelling State interest is further demonstrated by the memorandum from the Assembly Rules Committee in support of Assembly No. 12216 of 1972, which became chapter 687 of the Laws of 1972. That memorandum said:

Appendix B—Brief in the District Court Concerning "Substantiality"

"MEMORANDUM IN SUPPORT

"AN ACT to amend the social services law and the penal law, in relation to paternity and support proceedings against deserting parents.

"PURPOSE OF THE BILL: This bill amends section 101-a of the social services law by requiring a recipient parent or spouse, or the social services official, to file a petition for support against the deserting father or spouse. It also amends section 372-a to require added information to be filed with the Central Registry for Location of Deserting Parents and amends section 260.05 of the penal law to prevent the mere seeking of public assistance constituting a defense for non-support.

"JUSTIFICATION FOR THE BILL: In January 1972, the state had over 350,000 dependent children families on public assistance representing a 12-month increase of almost 18,000 families the great percentage of which were deserted by fathers.

"Existing law permits mothers, relatives and social service officials to find and collect support from these deserters. The 1971 department of social services report states that some 2,000 such fathers were found. The annual public assistance payments on behalf of these families is in excess of $1.2 billion—out of which it has been estimated that $19.5 million will be collected.

"Federal law requires the states to find and collect from these fathers and this bill will strengthen the state's plan of implementation.

"FISCAL IMPLICATIONS: Considerable savings would be realized if the above bill were implemented."

Supreme Court, U. S.
FILED
JUL 27 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1016
73-1085

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellant,

—*v.*—

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KRISTEN WYNN, and on behalf of all others similarly situated,

Appellees,

and

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant.

Appeal from the United States District Court for the Northern District of New York

BRIEF FOR THE APPELLANT LASCARIS

PHILIP C. PINSKY, ESQ.
Attorney for Appellant, John Lascaris
300 East Fayette Street
Syracuse, New York 13202

JOHN B. LaPARO, ESQ.
Chief Welfare Attorney
Onondaga County Department of Social Services

SPAULDING LAW PRINTING CO., SYRACUSE, N. Y.
(6671)

TABLE OF CONTENTS

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	3
Summary of Argument	6
Argument	6
Conclusion	11

CITATIONS

Cases:

Carleson v. *Remillard*, 406 U.S. 598 (1971)	8
Carleson v. *Taylor*, 404 U.S. 980 (1971)	2, 9
Edelman v. *Jordan*, 94 S.Ct. 1347 (1974)	9
Hagans v. *Lavine*, 94 S.Ct. 1372 (1974)	2
Juras v. *Meyers*, 404 U.S. 803 (1971)	2, 9
King v. *Smith*, 392 U.S. 309 (1968)	8, 10
Lavine v. *Shirley*, 409 U.S. 1052 (1972)	3
Lewis v. *Martin*, 397 U.S. 552 (1970)	10
New York State Department of Social Services v. *Dublino*, 413 U.S. 405 (1973)	8, 9
Shea v. *Vialpando*, 94 S.Ct. 1746 (1974)	10
Snell v. *Wyman*, 393 U.S. 323 (1969)	9
Townsend v. *Swank*, 404 U.S. 282 (1971)	8
Weaver v. *Doe*, 404 U.S. 987 (1971)	2, 9
Wyman v. *James*, 400 U.S. 309 (1971)	9

Page

Statutes:

28 U.S.C. —
§ 1253 2
§ 2281 2
§ 2284 2

42 U.S.C. —
§ 602(a)(7) 3
§ 602(a)(11) 3
§ 602(a)(17) 3
§ 602(a)(17)(A) 6
§ 602(a)(18) 3
§ 602(a)(21) 3
§ 602(a)(22) 3
§ 606(a) 3, 7

New York Social Services Law —
§ 101 ..... 3, 7
§ 101-a 2, 3, 4

New York Family Court Act —
§ 413 ..... 3, 7
§ 414 ..... 3, 7
§ 415 ..... 3, 7
§ 513 ..... 3, 7

18 New York Offiial Code of Rules and Regulations —
§ 352.1 5
§ 352.2 5
§ 352.3 5

Miscellaneous:

39 Fed. Reg. 16363 (May 8, 1974) 8

Page

Appendix:

42 U.S.C. § 602 — Public Health and Welfare 1a

42 U.S.C. § 606 — Public Health and Welfare 13a

New York State Social Welfare Law, § 101 and §101-a 14a

New York State Family Court Act, §§ 413, 414, 415 and 513 16a

18 New York Code of Rules and Regulations, §§352.1-3 ... 18a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellant,

—*v.*—

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KRISTEN WYNN, and on behalf of all others similarly situated,

Appellees,

and

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant.

Appeal from the United States District Court for the Northern District of New York

---

BRIEF FOR THE APPELLANT LASCARIS

OPINION BELOW

The opinion of the District Court is not yet reported. It is set forth in Appellant's Jurisdictional Statement, Appendix "A", pp. 1a-17a.

JURISDICTION

The appeal herein is from a final order made and entered in the United States District Court for the Northern District of New York by a specially constituted three-judge panel convened therein under 28 U.S.C. §§2281, 2284. The order granted summary judgment declaring that a portion of §101-a of the New York Social Services Law (McKinney Supp. 1973), as amended, violates the federal Social Security Act and permanently enjoined the defendants from denying or terminating AFDC assistance to plaintiff Anna Stuck or her minor children for failure to cooperate in obtaining support from an absent parent of her children. In substance, then, the final order enjoins the defendants from enforcing the state statute against the plaintiff, Anna Stuck.

This Court has jurisdiction to review the final judgment by direct appeal pursuant to 28 U.S.C. §1253, and this Court noted probable jurisdiction on June 10, 1974. The complaint pleaded a substantial constitutional question within the broad definition laid down by this Court in *Hagans* v. *Lavine*, — U.S. — , 94 S. Ct. 1372 (1974). Moreover, this Court has sustained its jurisdiction to review judgments of other three-judge district courts on direct appeal in cases enjoining enforcement of state statutes or regulations denying AFDC due to the non-cooperation of the parent-caretaker. *Carleson* v. *Taylor*, 404 U.S. 980 (1971); *Juras* v. *Meyers*, 404 U.S. 803 (1971); *Weaver* v. *Doe*, 404 U.S. 987 (1971).

QUESTIONS PRESENTED

Whether, consistently with the Social Security Act, a state may issue a grant of aid to families with dependent children (AFDC) only for the needs of the minor children when the mother-caretaker refuses to assist the state in its efforts to establish paternity and support.

Whether a regulation promulgated by the Secretary of Health, Education and Welfare authorizing a state to deny aid to a non-cooperating parent or caretaker, though not to such person's child, is contrary to the Social Security Act.

STATUTES INVOLVED

The relevant provisions of the Social Security Act, 42 U.S.C. 602(a)(7), (11), (17), (18), (21), (22) and 606(a) are set forth in the Appendix.

The relevant provisions of the New York State Social Services Law Section 101 and 101(a) and the New York State Family Court Act Sections 413, 414, 415 and 513 are set forth in the Appendix.

STATEMENT OF THE CASE

On December 11, 1972, this Court vacated the prior judgment in this action and remanded the case to the District Court "for further consideration in light of Chapter 687 of the 1972 Laws of New York (N.Y. Soc. Serv. Law §101-a, as amended)." *Lavine* v. *Shirley*, 409 U.S. 1052 (1972).

Upon the remand, plaintiffs' attorney moved on behalf of Anna Stuck and her minor children for leave to intervene as a plaintiff, and also moved for leave to file an amended complaint. Both motions were granted over objection.

The amended complaint did not reallege any facts concerning the original named plaintiffs. As the District Court found in its opinion (Appendix "A", of the Jurisdictional Statement of Appellant, Lascaris, p. 3a) "This omission was by design since they no longer feel themselves aggrieved due to intervening events. In its present posture, then, this is an action by Anna Stuck on behalf of herself, her minor children, and all others similarly situated, seeking declaratory and injunctive relief from

enforcement against them of §101-a of the New York Social Services Law because of their failure to cooperate in support proceedings as required by the section, and seeking as well the payment of benefits withheld on authority of the section."

The amended complaint contains two causes of action. The first cause alleges that the state statute conflicts with the Federal Social Security Act. The second cause asserts an equal protection clause constitutional challenge. The constitutional violation is alleged in the second cause of action as follows:

> "Defendants' action in erecting an additional requirement of eligibility constitutes a denial of equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States, in that it creates an invidious and unjustifiable distinction. New York's action in this case requires that impoverished mothers institute and cooperate in proceedings against their children's father; no such requirement is imposed on the well-to-do. Marriages of the well-to-do are not driven asunder by forcing one spouse to prosecute another. Classifications based on wealth have long been recognized as peculiarly obnoxious to the principles of equality enshrined in the Fourteenth Amendment."

Defendants, the New York State Commissioner of Social Services and the Onondaga County Commissioner of Social Services — that county being the residence of the intervenor Anna Stuck and her children — moved to dismiss the complaint for want of jurisdiction, contending that no substantial constitutional question was pleaded and that the issue as to the conflict with the Federal Social Security Act was not an independent basis for federal jurisdiction, either by a three-judge or single-judge district court. However, the three-judge district court denied that motion, finding that plaintiffs raised a substantial constitutional question which warranted the convening of a three-judge court (Appendix "A", Jurisdictional Statement of Appellant, Lascaris, p. 4a.)

The facts regarding intervenor Anna Stuck and her family may be stated briefly, as in the district court's opinion (Appendix "A", Jurisdictional Statement of Appellant, Lascaris, p. 3a.)

There had been no adjudication of paternity for one of her four children, and although she disclosed the name of the putative father and the town where he lived, she declined to give any further information, such as his correct address, although she conceded that she knew the address. Her reasons for refusing to give such information or to further cooperate in the paternity proceeding, which was never commenced since personal service of process could not be made, were that the putative father allegedly was unable to support the child because of physical disabilities, and because she had unpleasant experiences in other paternity proceedings against the father of her other three children.

Anna Stuck was afforded a "fair hearing" — an administrative hearing before the State Department of Social Services — and the decision by Commissioner Lascaris to exclude Anna Stuck from the AFDC grant for her children was affirmed. The fair hearing decision is in the record, as an exhibit to defendants' motion to dismiss.

It bears emphasis that all four of Anna Stuck's children remained eligible for AFDC and that only assistance for Anna Stuck herself, as the parent-caretaker of the children, was denied by the defendants.[1/]

1/ More specifically, the monetary AFDC allowance in New York State consists of a fixed "pre-added" allowance for "all items of need except shelter", plus a separate shelter allowance varying from county to county. (18 N.Y. Official Code of Rules and Regulations 352.1 - 352.3). This pre-added allowance is predicated upon the number of persons in the family and was reduced by one person to reflect the denial of assistance to Anna Stuck. The shelter allowance was reduced by one-fifth to reflect that one of the five persons in the household was not entitled to public assistance for herself. The denial of assistance to Anna Stuck amounted to about $75.00 to $100.00 per month (Appendix "A", Jurisdictional Statement of Appellant, Lascaris, p. 4a.)

SUMMARY OF ARGUMENT

The Social Security Act should be read to permit states to require parental cooperation in paternity and support proceedings as a condition of AFDC eligibility, because such eligibility requirements do not conflict with any express provision of the Act and also because such requirements are consistent with the federal statute and, indeed, are the most realistic and feasible means of complying with federal statutory requirements.

ARGUMENT

The injunction issued by the District Court frustrates important federal and state policies. The Social Security Act directs the states to establish paternity and secure support from absent parents. 42 U.S.C. §602(a)(17)(A). The assumption that the states can comply with this federal requirement without the cooperation of the parent-caretaker is plainly incorrect. An action to establish paternity cannot be commenced or successfully completed without identifying and locating the putative father and without the mother's testimony in support of a paternity petition. This identification and location, together with the requisite proof concerning conception, are, in virtually every case, within the exclusive knowledge of the mother.

In support matters, where paternity has been established or the child has been born in wedlock and support is sought from the deserting parent, independent evidence may be available as to the name of the responsible relative. However, without the cooperation of the mother in locating the absent father and providing identification of him in court, support orders will not be obtainable in the vast majority of cases. At the very least, the states will be required to expend much more time and effort in pursuing such support than would otherwise be necessary with the cooperation of the parent-caretaker.

In New York State, as in many other states, the primary responsibility for the support of children is with their parents,

not with the state. N.Y. Social Services Law, §101 (McKinney 1966); N.Y. Family Court Act, §§413-415 (McKinney Supp. 1973) and N.Y. Family Court Act, §513 (McKinney 1963).

It is hardly necessary to examine any legislative history to determine the justification for pursuing paternity and support. Every dollar of support paid by the absent parent of a child reduces the child's need for AFDC. Here, then, is a fundamental state policy, with which federal policy is obviously consistent, that federal and state welfare funds should be paid only for those children whose parents cannot otherwise support them, and that every legitimate effort should be expended to collect support from those primarily responsible.

There is a second important federal and state policy which is furthered by an examination of the parent-caretaker as to the location of the "absent" parent. Under the Social Security Act, one of the parents of the needy child must be absent from the home (except in the case of certain unemployed fathers residing in the home). 42 U.S.C. §606(a). Although the states might merely ask the parent-caretaker whether the other parent is living in the home or "somewhere else", it is much more logical for the states to pursue the issue in greater depth by determining, wherever possible, exactly where the absent parent is in fact living. At least the states ought to be able to obtain that information from the parent-caretaker where that parent has such knowledge. Surely, Congress never intended a mother applying for AFDC to be privileged to tell the State Welfare Department that her spouse is outside of her home, and that she knows his residence, but that she refuses to disclose it. Yet, this is the very effect of the judgment appealed from, because no court which has focused upon this issue has yet suggested even one other practical means of compelling the parent with such knowledge to disclose it.

In short, the construction by the court below of the Social Security Act assumes that Congress intended to require the states to obtain information concerning the location of allegedly absent parents, both for purposes of determining eligibility for AFDC and the extent of need, while at the same time precluding

the states from employing the most realistic source of such information. Surely, Congress never so intended and, just as surely, no previous decision of this court requires such a construction of the Social Security Act.

In its memorandum to this court as *amicus curiae*, the United States has demonstrated that decisions of this court in *Carleson* v. *Remillard*, 406 U.S. 598 (1971), *Townsend* v. *Swank*, 404 U.S. 282 (1971) and *King* v. *Smith*, 392 U.S. 309 (1968), involved state eligibility standards which conflicted with express definitions in the Social Security Act. On the other hand, in *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405 (1973), this court held that the Social Security Act "allows for complimentary state work incentive programs and procedures incident thereto—even if they become conditions for continued assistance. Such programs and procedures are not necessarily invalid, any more than other supplementary regulations promulgated within the legitimate sphere of state administration." 413 U.S. at 422.

The Secretary of Health, Education and Welfare has properly read the *Dublino* decision as authorizing a state to "establish, as a condition for including a parent's needs in his family's AFDC grant, a requirement that the parent of an AFDC child assist in establishing the paternity of a child born out of wedlock or in seeking support from a person having a legal duty to support the child." 39 Fed. Reg. 16363 (May 8, 1974). The secretary's construction of the relevant cases is most pertinent:

> "In *New York State Department of Social Services* v. *Dublino* 413 U.S. 405 (1973), the Court upheld a New York statutory scheme which permits the exclusion from the State's AFDC program of individuals eligible under the standards set forth in the definitional sections of title IV-A of the Act. The *Dublino* decision is important for it clarified the Court's previously ambiguous views with respect to the authority of States to impose their own conditions of eligibility for public assistance. First, the Court was careful to reaffirm the Federal State nature of the public assistance programs, stating that States must be permitted 'considerable latitude' in attempting to resolve their increasing fiscal

problems, including 'the critical problem of mounting welfare costs and the increasing financial dependence of many of [their] citizens.' 413 U.S., at 413. In addition, the Court firmly indicated that Congressional authorization for the States to exclude individuals covered under the Act exists in areas beyond the work incentive context. Citing *Wyman* v. *James* and *Snell* v. *Wyman*, the Court found that State regulations 'promulgated within the legitimate sphere of State administration' — 'even if they become conditions for continued assistance' — are not nessarily invalid under the Act, as construed in *Townsend* v. *Swank*, 413 U.S., at 422. Hence, in *Dublino* the Court indicated that States are not barred by the Act from imposing eligibility conditions which are not contained in the Act upon individuals eligible for assistance under Federal standards. Indeed, *Dublino* affirmed the States' discretion to impose such eligibility conditions as long as they assist the States in the efficient administration of their AFDC programs or further an independent State welfare policy and are not inconsistent with the provisions and purposes of the Social Security Act."

The district courts that have struck down state requirements of cooperation have distinguished earlier decisions of this Court in *Wyman* v. *James*, 400 U.S. 309 (1971) and *Snell* v. *Wyman*, 393 U.S. 323 (1969). However, in the *Dublino* case, this Court cited *James* and *Snell* in support of the proposition that the states may promulgate supplementary regulations even if they become conditions of eligibility.

The three summary affirmances by this Court, in *Juras* v. *Meyers*, 404 U.S. 803 (1971), *Weaver* v. *Doe*, 404 U.S. 987 (1971) and *Carleson* v. *Taylor*, 404 U.S. 980 (1971), all involved denials of aid to the dependent children as well as to the non-cooperating mother. Thus, those decisions may fairly be read as holding no more than the Congress intended that the mothers' non-cooperation should not directly justify denial of all aid and assistance to the dependent children.

Moreover, the three summary affirmances obviously "are not of the same precedential value as would be an opinion of this Court treating the question on the merits." *Edelman* v. *Jordan*, — U.S. —, 94 S. Ct. 1347, 1359 (1974).

Furthermore, those decisions were handed down at a time when the regulations of HEW were being construed, at least by the lower courts, as precluding denial of aid to the parent-caretaker and the minor children. The district courts could find no HEW regulation expressly authorizing denial of aid to the uncooperative parent-caretaker. Accordingly, this court may have regarded those decisions as giving effect to HEW policy, a judicial practice applied by this court to HEW regulations in *Lewis* v. *Martin*, 397 U.S. 552, 559 (1970). On the other hand, HEW now has taken an official position approving denial of aid to the uncooperative parent-caretaker, and so for the first time this court is presented with a district court decision that expressly invalidates the HEW regulation, rather than allegedly supporting HEW policy.

It is submitted that the federal courts should not preclude the states from requiring the assistance of parents in locating and prosecuting legally responsible relatives, even by making cooperation a condition of the parents' eligibility for welfare benefits. The judgment of the court below is contrary to the spirit of the Social Security Act which is "a scheme of cooperative federalism." *King* v. *Smith*, 392 U.S. 309, 316 (1968).

The policy of the State of New York to require cooperation of parents in paternity and support proceedings, as a condition of their eligibility for AFDC, does not defeat any congressional goals and does not violate any specific requirements of the Social Security Act. [cf. *Shea* v. *Vialpando*, — U.S. — , 94 S. Ct. 1746 (1974)].

CONCLUSION

The judgment of the district court should be reversed and the New York State Social Services Law should be declared constitutional and consistent with the federal Social Security Act.

Respectfully submitted,

PHILIP C. PINSKY, ESQ.
Attorney for Appellant,
John Lascaris

JOHN B. LaPARO, ESQ.
Chief Welfare Attorney
Onondaga County Department
of Social Services

July, 1974.

APPENDIX.

42 U.S.C. §602 — Public Health and Welfare.

§602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for the financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness; (5) provide (A) such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan, and (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community services aids, in the administration of the plan and for the use of non-paid or partially paid volunteers and a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency; and (6) provide that the State agency will make such reports, in such form and containing such information, as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to

assure the correctness and verification of such report; (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of such income; (8) provide that, in making the determinat under clause (7), the State agency --

(A) shall with respect to any month disregard --

(i) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 632(b) (2) and (3) of this title); and

42 U.S.C. §602 — Public Health and Welfare.

(B) (i) may, subject to the limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of an independent child, and

(ii) may, before disregarding the amounts referred to in subparagraph (A) and clause (i) of this subparagraph, disregard not more than $5 per month of any income;

except that, with respect to any month, the State agency shall not disregard any earned income (other than income referred to in subparagraph (B)) of --

(C) any one of the persons specified in clause (ii) of subparagraph (A) if such person --

(i) terminated his employment or reduced his earned income without good cause within such period (of not less than 30 days) preceding such month as may be prescribed by the Secretary; or

(ii) refused without good cause, within such period preceding such month as may be prescribed by the Secretary, to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined by the State or local agency administering the State plan, after notification by him, to be a bona fide offer of employment; of

(D) any of such persons specified in clause (ii) of subparagraph (A) if with respect to such month the income of the persons so specified (within the meaning of clause (7)) was in excess of their need as determined by the State agency pursuant to clause (7) (without regard to clause (8)), unless, for any one of

the four months preceding such month, the needs of such persons were met by the furnishing of aid under the plan;

(9) provide safeguards which were restrict the use or disclosure information concerning applicants and recipients to purposes directly connected with the administration of aid to families with dependent children; (10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall be furnished with reasonable promptness to all eligible individuals; (11) effective July 1, 1952, provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to families with dependent children in respect of a child who has been deserted or abandoned by a parent; (12) provide, effective October 1, 1950, that no aid will be furnished any individual under the plan with respect to any period with respect to which he is receiving old-age assistance under the State plan approved under section 302 of this title; (13) provide a description of the services which the State agency makes available to maintain and strengthen family life for children, including a description of the steps taken to assure, in the provision of such services, maximum utilization of other agencies providing similar or related services; (14) provide for the development and application of a program for such family services, as defined in section 606 (d) of this title, and child-welfare services, as defined in section 625 of this title, for each child and relative who receives aid to families with dependent children, and each appropriate individual (living in the same home as a relative or child receiving such aid whose needs are taken into account in making the determination under clause (7)), as may be necessary in the light of the

particular home conditions and other needs of such child, relative, and individual, in order to assist such child, relative, and individual to attain or retain capabilities for self-support and care in order to maintain and strengthen family life and to foster child development; (15) provide (A) for the development of a program, for each appropriate relative and dependent child receiving aid under the plan and for each appropriate individual (living in the same home as a relative and child receiving such aid) whose needs are taken into account in making the determination under clause (7), for preventing or reducing the incidents of births out of wedlock and otherwise strengthening family life, and for implementing such programs by assuring that in all appropriate cases (including minors who can be considered to be sexually active) family planning services are offered to them and are provided promptly (directly or under arrangements with others) to all individuals voluntarily requesting such services, but acceptance of family planning services provided under the plan shall be voluntary on the part of such members and individuals and shall not be a prerequisite to eligibility for or the receipt of any other service under the plan; and (B) to the extent that services provided under this clause or clause (14) are furnished by the staff of the State agency or the local agency administering the State plan in each of the political subdivisions of the State, for the establishment of a single organizational unit in such State or local agency, as the case may be, responsible for the furnishing of such services; (16) provide that where the State agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of such child it shall bring such condition to the attention of the appropriate court or law enforcement agencies in the State, providing such data with respect to the situation it may have; (17) provide --

(A) for the development and implementation of a program under which the State agency will undertake --

(i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, and

(ii) in the case of any child receiving such aid who has been deserted or abandoned by his parent, to secure support for such child from such parent (or from any other person legally liable for such support), utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support, and

(B) for the establishment of a single organizational unit in the State agency or local agency administering the State plan in each political subdivision which will be responsible for the administration of the program referred to in clause (A);

(18) provide for entering into cooperative arrangements with appropriate courts and law enforcement officials (A) to assist the State agency in administering the program referred to in clause (17) (A), including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and (B) with respect to any other matters of common concern to such courts or officials and the State agency or local agency administering the State plan; (19) provide -

(A) that every individual, as a condition of eligibility for aid under this part, shall register for manpower services, training, and employment as provided by regulations of the Secretary of Labor, unless such individual is --

(i) a child who is under age 16 or attending school full time;

(ii) a person who is ill, incapacitated, or of advanced age;

(iii) a person so remote from a work incentive project that his effective participation is precluded;

(iv) a person whose presence in the home is required because of illness or incapacity of another member of the household;

(v) a mother or other relative of a child under the age of six who is caring for the child; or

(vi) the mother or other female caretaker of a child, if the father or other adult male relative is in the home and not excluded by clause (i), (ii), (iii), or (iv) of this subparagraph (unless he has failed to register as required by this subparagraph, or has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under work incentive program or accept employment as described in subparagraph (F) of this paragraph);

and that any individual referred to in clause (v) shall be advised of her option to register, if she so desires, pursuant to this paragraph, and shall be informed of the child care services (if any) which will be available to her in the event she should decide so to register;

(B) that aid under the plan will not be denied by reason of such registration or the individual's certification to the Secretary of Labor under subparagraph (G) of this paragraph, or by reason of an individual's participation on a project under the program established by Section 632(b) (2) or (3) of this title;

(C) for arrangements to assure that there will be made a non-Federal contribution to the work incentive programs established by part C by appropriate agencies of the State or private organizations of 10 per centum of the cost of such programs, as specified in section 635(b) of this title;

(D) that (i) training incentives authorized under section 634 of this title, and income derived from a special work project under the program established by section 632 (b) (3) of this title shall be disregarded in determining the needs of an individual under section 602(a)(7) of this title, and (ii) in determining such individual's needs the additional expenses attributable to his participation in a program established by section 632 (b)(2) or (3) of this title shall be taken into account;

(E) Repealed. Pub. L. 92-223, § 3(a) (5), Dec. 28, 1971, 85 Stat. 804.

(F) that if and for so long as any child, relative, or individual (certified to the Secretary of Labor pursuant to subparagraph (G)) has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program established by part C with respect to which the Secretary of Labor has determined his participation is consistent with the purposes of such part C or to have refused without good cause to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona fide offer of employment --

(i) if the relative makes such refusal, such relative's needs shall not be taken into account in making the determination under clause (7),

and aid for any dependent child in the family in the form of payments of the type described in section 606 (b) (2) of this title (which in such a case shall be without regard to clauses (A) through (E) thereof) or section 608 of this title will be made:

(ii) aid with respect to a dependent child will be denied if a child who is the only child receiving aid in the family makes such refusal;

(iii) if there is more than one child receiving aid in the family, aid for any such child will be denied (and his needs will not be taken into account in making the determination under clause (7)) if that child makes such refusal; and

(iv) if such individual makes such refusal, such individual's needs shall not be taken into account in making the determination under clause (7);

except that the State agency shall, for a period of sixty days, make payments of the type described in section 606(b)(2) of this title (without regard to clauses (A) through (E) thereof) on behalf of the relative specified in clause (i), or continue aid in the case of a child specified in clause (ii) or (iii), or take the individual's needs into account in the case of an individual specified in clause (iv), but only if during such period such child, relative, or individual accepts counseling or other services (which the State agency shall make available to such child, relative, or individual) aimed at persuading such relative, child, or individual, as the case may be, to participate in such program in accordance with the determination of the Secretary of Labor; and

(G) that the State agency will have in effect a special program which (i) will be administered by a separate administrative unit and the employees of which will,

to the maximum extent feasible, perform service only in connection with the administration of such program, (ii) will provide (through arrangements with others or otherwise) for individuals who have been registered pursuant to subparagraph (A), in accordance with the order of priority listed in section 633(a) of this title, such health, vocational rehabilitation, counseling, child care, and other social and supportive services as are necessary to enable such individuals to accept employment or receive manpower training under part C, and will, when arrangements have been made to provide necessary supportive services, including child care, certify to the Secretary of Labor those individuals who are ready for employment or training under Part C, (iii) will participate in the development of operational and employability plans under section 633 (b) of this title; and (iv) provides for purposes of clause (ii), that, when more than one kind of child care is available, the mother may choose the type, but she may not refuse to accept child care services if they are available;

(20) effective July 1, 1969, provide for aid to families with dependent children in the form of foster care in accordance with section 608 of this title; (21) provide that the State agency will report to the Secretary, at such times (not less often than once each calendar quarter) and in such manner as the Secretary may prescribe --

(A) the name, and social security account number, if known, of each parent of a dependent child or children with respect to whom aid is being provided under the State plan --

(i) against whom an order for the support and maintenance of such child or children has been issued by a court of competent jurisdiction but who is not making payments in compliance or partial compliance with such order, or against whom a petition for such an order has been filed in a court having jurisdiction to receive such petition, and

(ii) whom it has been unable to locate after requesting and utilizing information included in the files of the Department of Health, Education, and Welfare maintain pursuant to Section 405 of this title,

(B) the last known address of such parent and any information it has with respect to the date on which such parent could last be located at such address, and

(C) such other information as the Secretary will specify to assist in carrying out the provisions of section 610 of this title;

(22) provide that the State agency will, in accordance with standards prescribed by the Secretary, cooperate with the State agency administering or supervising the administration of the plan of another State under this part --

(A) in locating a parent residing in such State (whether or not permanently) against whom a petition has been filed in a court of competent jurisdiction of such other State for the support and maintenance of a child or children of such parent with respect to whom aid is being provided under the plan of such other State, and

(B) in securing compliance or good faith partial compliance by a parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of a child or children of such parent with respect to whom aid is being provided under the plan of such other State;

and, (23) provide that by July 1, 1969, the amounts used

by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted; and (24) if an individual is receiving benefits under subchapter XVI of this chapter, then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits of the family under this subchapter and his income and resources shall not be counted as income and resources of a family under this subchapter.

42 U.S.C. §606 — Public Health and Welfare.

§606. Definitions

When used in this part —

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

New York State Social Welfare Law, §101 and §101-a.

§101. Liability of relatives to support

1. The spouse or parent of a recipient of public assistance or care or of a person liable to become in need thereof shall, if of sufficient ability, be responsible for the support of such person, provided that a parent shall be responsible only for the support of a minor child. Step-parents shall in like manner be responsible for the support of minor step-children.

2. The liability imposed by this section shall be for the benefit of the public welfare district concerned or any legally incorporated non-profit institution which receives payments from any governmental agency for the care of medically indigent persons, and such liability may be enforced by appropriate proceedings and actions in a court of competent jurisdiction. Such proceedings and actions may be brought by such an institution in any court wherein a similar proceeding or action could be brought by a public welfare official. L. 1940, c. 619, §10; amended L. 1945, c. 656, §1; L. 1960, c. 1088; L. 1965, c. 52, §1; L. 1966, c. 256, §18 eff. April 30, 1966.

§101-a. Proceedings to compel support by persons in need thereof

1. A recipient of public assistance or care or a perso liable to become in need thereof may bring proceedings in a court of competent jurisdiction against any person responsible for his or her support as provided in section one hundred one of this chapter to compel any such person so responsible to provide for or contribute to such support.

2. An applicant or recipient of public assistance who is the parent of a child or minor shall assist and cooperate with the social services official and appropriate authorities to obtain support or contributions to support for such child or spouse from the other parent or spouse by:

(a) Furnishing the social services official with appropriate information including the location of the other parent or spouse.

(b) Filing a petition and furnishing evidence in a proceeding for the establishment of the child's paternity and support under article five of the family court act. [1]

(c) Filing a petition and furnishing evidence in a proceeding to secure support for her child and herself under article four of the family court act. [2]

3. In the event an applicant or recipient of public assistance fails to institute a proceeding in accordance with the provisions of this section or other similar provisions of law, the social services official shall institute such proceeding under the appropriate provisions of the family court act and if such applicant or recipient willfully fails or refuses to furnish evidence necessary to support such petition, or furnish information relative to the location of the other parent, the social services official shall not provide or continue to provide assistance or care for the maintenance of such applicant or recipient so long as such applicant or recipient fails to assist or cooperate as required by the provisions of this section or other provisions of law.

As amended L. 1972, c. 687, §1.

New York State Family Court Act, §§413, 414, 415 and 513.

§413. Father's duty to support child

The father of a minor child is chargeable with the support of his child and, if possessed of sufficient means or able to earn such means, may be required to pay for his support a fair and reasonable sum according to his means, as the court may determine. As amended L. 1966, c. 256, §44, eff. April 30, 1966.

L. 1966, c. 256, § 44, eff. April 30, 1966, inserted "minor" preceding "child."

§414. Mother's duty to support child; apportionment

If the father of a minor child is dead, incapable of supporting his child, or cannot be found within the state, the mother of such child is chargeable with its support and, if possessed of sufficient means or able to earn such means, may be required to pay for its support a fair and reasonable sum according to her means, as the court may determine. The court may apportion the costs of the support of the minor child between the parents according to their respective means and responsibilities. As amended L. 1966, c. 256, § 45, eff. April 30, 1966.

§415. Duties to support recipient of public assistance or welfare and patients in institutions in the department of mental hygiene

The spouse or parent of a recipient of public assistance or care or of a person liable to become in need thereof or of a patient in an institution in the department of mental hygiene, if of sufficient ability, is responsible for the support of such person or patient, provided that a parent shall be responsible only for the support of his minor child. In its discretion, the court may require any such person to contribute a fair and reasonable sum for the support of such relative and may apportion the costs of such support among such persons as may be just and appropriate in view of the needs of the petitioner and the

other circumstances of the case and their respective means. Step-parents shall in like manner be responsible for the support of minor children. As amended L. 1965, c. 674; L. 1966, c. 256, § 46, eff. April 30, 1966.

§513. Obligation of parents

Each parent of a child born out of wedlock is liable for the necessary support and education of the child and for the child's funeral expenses. If a parent dies, an order of support or a judicially approved settlement made prior to that parent's death shall be enforceable as a claim against the deceased parent's estate in an amount to be determined by the surrogate's court not greater than is provided in said order or settlement, having regard to the age of the child, the ability of the surviving parent to support and educate it, the amount of property left by the deceased parent and the number, age and financial condition of those other persons entitled to support by the deceased parent during his or her lifetime.

18 New York Code of Rules and Regulations, §§352.1-3.

Section 352.1 Standard of need for determining eligibili
The eligibility for public assistance of all persons who constitute or are members of a family household shall be determined by a social services district by applying the following Statewide standard of monthly need which shall consist of:

(a) regular recurring monthly needs, exclusive of shelter and fuel for heating, in accordance with the following schedule:

SCHEDULE SA-1
STATEWIDE STANDARD OF NEED

Number of Persons in Household						
One	Two	Three	Four	Five	Six	Each Additional Person
$94	134	170	211	254	299	45

(b) plus the amount of money for shelter and fuel for heating required monthly for such persons in accordance with provisions of law, board rule and department regulations; and

(c) for any of such persons who may because of their case circumstances require any of the following items in accordance with applicable provisions of law, board rules and department regulations, the standard of need shall include the cost of the required item or items in accordance with such provisions: furniture and furnishings for the establishment of a home, essential repair of heating equipment, furnishings for the establishment of a home, essential repair of heating equipment, cooking stoves and refrigerators, additional cost of meals for persons unable to prepare meals at home, replacement of clothing or furniture which has been lost in a fire, flood or other like catastrophe, occupational training, additional allowances in AABD, cost of services and supplies already received, miscellaneous shelter costs, day care, homemaker services, housekeeping services, camp fees and payment of life insurance premiums

18 New York Code of Rules and Regulations, §§352.1-3.

352.2 Allowances and grants for persons who constitute or are members of a family household. (a) Each social services district shall utilize the applicable schedules of monthly grants and allowances as found in subdivision (e) to provide for all items of need, exclusive of:

(1) shelter;

(2) fuel for heating;

(3) additional cost of meals for persons who are unable to prepare meals at home;

(4) purchase of necessary and essential furniture required for the establishment of a home;

(5) replacement of necessary furniture and clothing for persons in need of public assistance who have suffered the loss of such items as the result of fire, flood or other like catastrophe;

(6) essential repair of heating equipment, cooking stoves and refrigerators;

(7) allowances for occupational training, and

(8) other items for which specific provision is otherwise made in this Part.

(b) For the purpose of such monthly grants and allowances a child or children or adults residing with self-maintaining nonlegally responsible relatives or friends, shall be considered as a separate household.

(c) For the purpose of such monthly grants and allowances children or adults residing with a SSI beneficiary, shall be considered as a separate household.

(d) Supplemental allowances and grants may not be made other than as authorized under the regulations nor in excess of established schedules. A special allowance and grant may be made to duplicate a grant already made

18 New York Code of Rules and Regulations, §§352.1-3.

because the cash has been lost or stolen; such duplicate allowance and grant is not reimbursable by the State.

(e) The montly grants and allowances shall be as follows:

SCHEDULE SA-3
STATEWIDE MONTHLY GRANTS AND ALLOWANCES
FOR ADC-VA-HR

Number of persons						
One	*Two*	*Three*	*Four*	*Five*	*Six*	*Each additional person*
$84	134	179	221	264	320	45

SCHEDULE SA-3
STATEWIDE MONTHLY GRANTS AND ALLOWANCES
FOR HR-VA-ADC

Number of Persons						
One	*Two*	*Three*	*Four*	*Five*	*Six*	*Each Additional Person*
$76	121	161	208	256	296	41

(e) When the income of an applicant or recipient is in excess of schedule SA-3 but less than SA-1, he shall continue to be eligible for the other items of need and the cost of services specified in department regulation section 352.1. Such excess income shall be applied toward the payment for other items of need, except those provided under the purchase of service provisions, medical assistance and food stamp programs.

(1) The amount of the basic allowance shall be determined in accordance with the following table:

18 New York Code of Rules and Regulations, §§352.1-3.

TABLE FOR COOPERATIVE BUDGETING
Allowances for Basic Needs

Number of Persons in Assistance Group	*Cost Standard SA-1*	*One AABD Person in Group*		*Two AABD Persons in Group*	
		AABD	*ADC/HR*	*AABD*	*ADC/HR*
1	$ 84	—	—	—	—
2	134	$67	$ 60	—	—
3	179	60	107	$119	$ 54
4	221	55	156	116	104
5	264	57	204	114	153
6	320	56	247	110	197
7	374	58	289	107	240
8	419	52	330	106	283
9	464	52	371	108	325
10	509	51	413	102	366

For all other families of different size or composition the following formula applies:

$\frac{n[X]}{N}$ rounded to nearest $ = amount to be allowed for AABD portion of the grant

$.90 \left[\frac{(N-n)(X)}{N} \right]$ rounded to nearest $ = amount to be allowed for the ADC, HR portion of the grant.

n = Number of AABD persons in assistance group
X = The cost standard
N = The number of persons in assistance group

(2) Allowances for other items of need, such as the additional allowance for AABD, shall be applied to the appropriate cooperative case.

(3) All available and unrestricted income of an applicant or recipient shall be pro-rated and applied against his needs and the needs of his legally responsible relatives.

(4) Income received by an individual who is not legally responsible for other members of the public assistance household shall be applied only against his estimate of needs. The surplus shall not be applied to the cooperative case.

18 New York Code of Rules and Regulations, §§352.1-3.

352.3 Rent allowances.* [(a) Each social services district shall establish a monthly allowance schedule for rent based on the number of rooms, with or without heat, furniture and furnishings. Such allowance schedule shall provide a sufficient amount for all persons to obtain housing in accordance with standards of public health in the community. The schedule established shall be filed with the department. An allowance for rent shall be made in the amount actually paid by the recipient but not in excess of the appropriate maximum of such schedule.]

*(a) Each social services district shall provide an allowance for rent in the amount actually paid but not in excess of the appropriate maximum of such district in accordance with the following schedule:

18 New York Code of Rules and Regulations, §§352.1-3.

LOCAL AGENCY MAXIMUM MONTHLY SHELTER ALLOWANCES
WITHOUT HEAT BY FAMILY SIZE

	1	2	3	4	5	6	7	8+
Albany	126	151	153	153	153	153	153	153
Allegany	88	106	106	106	106	106	106	106
Broome	101	121	136	136	136	136	150	150
Chautauqua	89	94	93	93	93	93	93	93
Cayuga	78	94	94	100	106	114	114	114
Chautauqua	75	90	90	96	96	109	107	157
Chemung	* 74	87	91	94	101	113	120	120
Chenango	68	83	98	98	108	108	108	121
Clinton	58	71	78	88	92	92	93	93
Columbia	106	130	130	132	132	132	132	132
Cortland	87	105	105	139	151	151	151	161
Delaware	78	95	97	97	97	97	97	102
Dutchess	113	136	143	145	155	155	155	155
Erie	113	135	145	135	137	137	137	137
Essex	74	90	90	90	90	90	90	91
Franklin	60	73	73	80	80	80	80	80
Fulton	78	94	94	97	97	97	97	97
Genesee	97	116	116	116	116	116	116	171
Greene	88	106	106	110	110	110	110	110
Hamilton	56	70	78	79	89	97	103	113
Herkimer	122	147	147	147	147	147	147	147
Jefferson	56	70	78	79	89	97	103	113
Lewis	70	85	86	88	93	95	110	111
Livingston	77	93	93	93	93	93	93	93
Madison	105	132	137	137	137	137	137	137
Monroe	130	144	183	156	167	189	182	176
Montgomery	78	98	93	93	92	92	92	127
Nassau	139	154	215	248	271	285	333	356
New York City	117	140	180	184	174	209	261	261
Niagara	91	109	114	115	134	126	165	146
Oneida	76	93	96	101	107	118	130	130
Onondaga	106	127	127	127	139	139	139	139
Ontario	106	128	128	130	131	131	131	131
Orange	115	128	146	148	154	154	154	154
Orleans	79	96	101	101	101	101	101	101
Oswego	68	81	97	97	107	107	113	113
Otsego	96	116	116	116	116	116	116	126
Putnam	118	141	146	163	167	208	208	208
Rensselaer	84	102	102	102	102	102	102	121
Rockland	145	173	217	221	257	311	340	340
St. Lawrence	88	101	182	169	129	110	110	110
Saratoga	104	126	134	141	148	148	148	148
Schenectady	93	111	113	114	126	146	146	186
Schoharie	96	116	116	116	116	116	116	126
Schuyler	105	127	127	127	127	127	127	127
Seneca	78	90	90	96	96	100	107	157
Steuben	79	95	115	118	118	116	116	132
Suffolk	126	202	208	208	267	273	276	300
Sullivan	139	144	161	169	183	204	204	204
Tioga	67	82	95	95	95	95	99	99
Tompkins	103	120	127	141	145	148	168	184
Ulster	109	121	136	140	142	158	158	159
Warren	70	85	86	86	93	95	110	111
Washington	80	97	97	98	105	106	106	114
Wayne	96	116	116	116	116	116	116	116
Westchester	155	185	235	303	307	307	348	400
Wyoming	70	88	86	88	93	95	110	111
Yates	80	73	73	80	80	80	80	80

† Effective July 1, 1974 bracketed material deleted.
* Effective July 1, 1974 material inserted.

147—SS—4-30-74

18 New York Code of Rules and Regulations, §§352.1-3.

LOCAL AGENCY MAXIMUM MONTHLY SHELTER ALLOWANCES WITH HEAT BY FAMILY SIZE

	1	2	3	4	5	6	7	8+
Albany	163	168	173	180	181	183	186	186
Allegany	106	134	142	150	158	165	168	161
Broome	121	149	172	180	188	195	202	205
Cattaraugus	89	113	139	157	140	148	145	149
Cayuga	96	119	136	140	149	159	168	168
Chautauqua	88	108	104	112	113	139	138	177
Chemung	92	112	123	134	144	158	168	171
Chenango	88	111	134	142	185	187	180	179
Clinton	75	99	114	132	139	141	145	146
Columbia	126	185	162	172	178	177	180	185
Cortland	107	133	141	153	158	200	208	218
Delaware	98	122	133	141	144	168	149	157
Dutchess	121	161	175	185	196	200	208	206
Erie	126	149	158	158	162	165	184	188
Essex	97	124	135	144	147	159	181	188
Franklin	88	107	113	134	137	140	141	147
Fulton	98	123	130	141	144	146	149	159
Genesee	115	141	148	159	159	181	184	223
Greene	106	131	140	150	158	155	158	184
Hamilton	79	104	118	128	145	157	164	180
Herkimer	142	175	188	181	196	196	199	208
Jefferson	78	98	114	138	136	148	156	168
Lewis	90	113	132	133	140	144	182	188
Livingston	95	118	135	158	156	159	141	144
Madison	128	165	168	171	174	178	179	183
Monroe	126	160	174	184	187	190	196	213
Montgomery	98	130	138	156	159	168	164	183
Nassau	144	175	261	278	306	322	373	397
New York City	123	159	151	190	205	262	296	297
Niagara	104	128	130	138	146	149	199	198
Oneida	98	121	151	148	154	167	188	188
Onondaga	134	182	189	167	182	204	207	220
Ontario	134	185	169	179	176	178	179	188
Orange	128	168	177	188	197	199	208	205
Orleans	97	121	188	141	144	146	149	188
Oswego	94	106	139	137	180	188	169	169
Otsego	116	144	151	160	163	165	185	189
Putnam	136	168	178	202	205	208	208	220
Rensselaer	101	119	133	139	139	121	134	184
Rockland	160	194	248	264	288	246	279	288
St. Lawrence	108	139	156	158	156	159	168	165
Saratoga	126	168	170	189	196	197	200	208
Schenectady	189	138	133	141	128	178	173	188
Schoharie	116	144	188	160	168	168	169	169
Schuyler	125	188	189	167	170	172	178	178
Seneca	98	115	133	156	139	146	188	208
Steuben	89	128	181	189	162	165	168	187
Suffolk	201	262	289	281	282	310	314	313
Sullivan	140	172	197	212	220	228	228	228
Tioga	87	110	131	139	142	144	181	184
Tompkins	126	188	189	181	189	208	211	205
Ulster	127	166	167	180	188	188	206	210
Warren	90	113	132	150	160	144	162	168
Washington	96	122	139	158	168	181	184	188
Wayne	114	141	148	156	159	161	184	187
Westchester	170	206	252	265	288	284	287	342
Wyoming	90	113	123	123	140	144	168	189
Yates	78	98	105	170	123	136	138	131

(b) When the tenant recipient is obligated to pay for water as a separate charge, an allowance shall be made for the additional amount required to be paid.

(c) For children or adults in receipt of public assistance residing with a self-maintaining non-legally responsible relative or friend or a SSI beneficiary, the allowance for rent and/or other shelter costs shall be computed on a prorated basis but not in excess of the appropriate agency maximum for the number of people in the assistance grant.

(d) An allowance for rent shall be made for a period not in excess of 60 days, when essential to retain a housing accommodation to which a recipient temporarily receiving care in a medical facility may return upon discharge from such facility.

(e) An allowance for rent shall be made for recipients who are tenants of city, State or Federally-aided public housing in accordance with the following schedule except when a modified allowance is approved by the department for a specific housing authority:

Apartment size	*Monthly rent*
"0" Bedrooms	$ 66
1 Bedroom	77
2 Bedrooms	90
3 Bedrooms	101
4 Bedrooms	107
5 Bedrooms	110

When recipients of public assistance are residing with a nonpublic assistance tenant of record, the rent allowance shall be a prorata share of the above rent schedule, or modified rent schedule.

(f) Rent allowances for hotel/motel facilities. An allowance for shelter shall be made for recipients temporarily housed in hotel/motel facilities under the following circumstances:

(1) No other suitable housing either public or private is available to house the recipient.

(2) Hotel/motel accommodations without cooking facilities shall be utilized only when accommodations with such facilities are not available.

(3) The continued need for hotel/motel accommodations shall be reviewed, evaluated and authorized monthly by the social services district.

(4) At the end of the third calendar month and at monthly intervals thereafter a detailed report of such review and evaluation shall be prepared and kept on file by the social services district.

(g) Maximum reimbursable amount. (1) The maximum reimbursable amount for hotel/motel shelter costs shall be limited to $5 per day per person for a period not in excess of six months duration.

(2) Reimbursement on restaurant allowances provided for individuals temporarily residing in hotel/motel situations shall be limited to a six month period.

(h) When an employable recipient is required to receive his grant in person from the State Employment Service on a semi-monthly basis, the social services district may provide the full amount of any shelter allowance in one of the semi-monthly grants.

Supreme Court, U. S.
FILED
SEP 25 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1016
73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN, and on behalf of all others similarly situated; and

ANNA STUCK, Intervenor,

Appellees.

(Continued on inside front cover)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE STUCK

ISADORE GREENBERG, Counsel of Record
DOUGLAS A. ELDRIDGE, of Counsel
Onondaga Neighborhood Legal Services, Inc.
633 South Warren Street
Syracuse, New York 13202
(315) 475-3127

Attorneys for Appellees

Washington, D.C. • CLB PUBLISHERS' LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

STATMENT OF THE CASE

A. History 2

B. Facts 4

ARGUMENT

I. UNDER THE TOWNSEND DOCTRINE NEW YORK SOCIAL SERVICES LAW SECTION 101-a IS VOID FOR SETTING A CONDITION OF ELIGIBILITY FOR ADC NOT PROVIDED BY THE SOCIAL SECURITY ACT 7

II. THE CLAIM THAT NEW YORK SOCIAL SERVICES LAW 101-a PENALIZES ONLY THE CARETAKER AND NOT THE CHILDREN IS "UNREALISTIC" AND DOES NOT REMEDY THE ILLEGAL CONDITION OF ELIGIBILITY 13

III. BECAUSE CONGRESS NEVER INTENDED THE NOLEO PROVISIONS TO BE CONDITIONS OF ELIGIBILITY THE AMENDMENT TO 45 CFR §233.90 IS NOT A GUIDEPOST TO BE FOLLOWED JUDICIALLY 18

CONCLUSION 28

TABLE OF AUTHORITIES

Cases:

Burnet v. Coronado Oil and Gas Co., 285 U.S. 393, 52 S.Ct. 443 (1932) 9

Carleson v. Taylor, 404 U.S. 980, 92 S.Ct. 446 (1971) 2, 8

Page

Carleson v. Remillard, 406 U.S. 598, 92 S.Ct. 1932 (1972) 9, 10

Chee v. Graham, Civ. 70-532 Phx. WEC (D. Ariz. 1971) 8

Dandridge v. Williams, 397 U.S. 471, 90 S.Ct. 1153 (1970) 16

Doe v. Burns, sub nom. Doe v. Gillman, 479 F.2d 646 (8th Cir. 1973) cert. filed Sept. 4, 1973 8

Doe v. Ellis, 350 F. Supp. 375 (D. S.C. 1972) 8

Doe v. Harder, 310 F. Supp. 302 (D.Conn. 1970) 8, 17

Doe v. Kurtis, 306 F. Supp. 509 (S.D. N.Y. 1969) 8

Doe v. Lavine, 347 F. Supp. 357 (S.D. N.Y. 1972) 8

Doe v. Rampton, ___ F. Supp. ___ (D.C. Utah 1973) 8

Doe v. Schmidt, 330 F. Supp. 159 (E.D. Wisc. 1971) 8

Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969) appeal dism'd 396 U.S. 488 (1970) 8, 17

Doe v Swank, 332 F. Supp. 61 (N.D. Ill. 1971) aff'd sub nom. Weaver v. Doe, 404 U.S. 987 (1971) 2, 8

Doe v. Wohlgemuth, (T.R.O.) Civ. Act. No. 1958 (W.D. Pa. 1971) 8

Galindo v. Vowell, (consent j'ment) Civ. 5A-71-CA-248 (W.D. Tex. 1971) 8

Godfrey v. Stanton, Civ. No. 72-F-77 (N.D. Ind. June 8, 1973) 8

Jordan v. Edelman, ___ U.S. ___, 94 S.Ct. 1347 (1974) 9

Lewis v. Lavine, ___ F. Supp. ___ (S.D. N.Y. 1972) 8

Magness v. Davidson, Civ. 71-1263-HM (D. Md. 1972) 8

Page

Messer v. Flowers, Preliminary Inj. Civ. No. 74-117-CH, (S.D. W. Va. May 10, 1974) 8

Meyers v. Juras, 327 F. Supp. 759 (D.Ore. 1971) aff'd 404 U.S. 303, 92 S.Ct. 91 (1971), pet. for rehearing denied 404 U.S. 803, 92 S.Ct. 446 (1971) 2, 8, 9

Newman v. Mary, (T.R.O.) Civ. No. 74-934, Section I, (Apr. 24, 1974, E.D. La.) (E.D. La. Apr. 24, 1974) 8

New York State Dept. of Social Services v. Dublino, 413 U.S. 405, 93 S.Ct. 2507 (1973) 10, 11, 12, 26

Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933) 21

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) 21

Saddler v. Winstead, 332 F. Supp. 130 (N.D. Miss. 1971) 8

Saiz v. Goodwin, 325 F. Supp. 23 (D. New Mex. 1971), rem'd 450 F.2d 788 (10th Cir. 1971), 340 F. Supp. 165 (D.New Mex. 1971) 8

Serrano v. Priest, 96 Cal. Rptr. 601 (1971) 9

Shirley v. Lavine, 365 F. Supp. 818 (1973) 4, 13, 27

Shirley v. Lavine, oral opinion June 7, 1972 appears in Appendix at p. 49 18

Snell v. Wyman, 393 U.S. 323, 89 S.Ct. 553 (1969) 11, 12

Story v. Roberts, 352 F. Supp. 473 (D.C. Fla. 1972) 8

Taylor v. Martin, 330 F. Supp. 85 (N.D. Calif. 1971), aff'd. sub nom. Carleson v. Taylor, 404 U.S. 980, 92 S.Ct. 446 (1971) 2, 8, 9

Townsend v. Swank, 404 U.S. 282, 92 S.Ct. 505 (1971) 7, 10, 11, 12

United States v. Shreveport Grain and Elevator, 287 U.S. 77 (1932) 21

Weaver v. Doe, 404 U.S. 987, 92 S.Ct. 537 (1971) 8, 9

Page

Woods v. Miller, 318 F. Supp. 510 (W.D. Pa. 1970) 8

Wyman v. James, 400 U.S. 309, 91 S.Ct. 381 (1971) 11, 12

United States Statutes:

42 USC § 601 ..... 2, 16, 18

42 USC § 602 ..... 2, 10, 12, 17, 26

42 USC § 606(b)(1) 14, 19

New York State Statutes:

Social Services Law § 101-a (Chapter 687 of the 1972 Laws of New York) (McKinney Supp. 1973-74) 3

Federal Regulations:

45 CFR § 235.70 ..... 2, 21

45 CFR § 233.20(a)(3)(ii) 12

45 CFR § 233.90 ..... 3, 27

39 Fed. Reg. May 8, 1974 at 16362 11

39 Fed. Reg. July 24, 1974 at 26912 11

New York State Regulations:

18 NYCRR § 351.37 12

18 NYCRR § 352.16 12

18 NYCRR § 352.23 12

18 NYCRR § 369.2(f)(3)(ii)(e) 2, 3, 4

Miscellaneous:

Social Security Board RFL 331, Item 197 (Aug. 9, 1941) 13

House Committee on Ways and Means Hearings on H.R. 2892 and H.R. 2893, 81st Cong., 1st Sess. (1949) 14

H.R.Rep. No. 1300, 81st Cong., 1st Sess. (1949); U.S. Serial 6-11301 ..... 15, 19

H.R.Rep. No. 544, 90th Cong. 1st Sess. (1967) 24,25

Page

H.R. 3153 §151(c)(3)(5), 93d Cong., 1st Sess. (1973) 17

S.Rep. No. 1669, 92d Cong. 2d Sess. 172 (1950) 19

S.Rep. No. 1589, 81st Cong., 2d Sess. p. 7, (1962); 1962 United States Code Congressional Administrative News 1943 23

S.Rep. No. 744, 90th Cong. 1st Sess. (1967) 25

95 Cong. Rec. 13932 (1949) 15

95 Cong. Rec. 8485 (1950) 15

96 Cong. Rec. 8794 (1950) 15

113 Cong. Rec. 36368 (1967) 25

113 Cong. Rec. 36925 (1967) 25

113 Cong. Rec. 32592 (1967) 26

113 Cong. Rec. 33540 (1967) 26

113 Cong. Rec. 33541 (1967) 12, 20, 21, 22

Handbook of Public Assistance Administration, United States Department of Health, Education and Welfare 26

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1016
73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN, and on behalf of all others similarly situated; and

ANNA STUCK, Intervenor,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE STUCK

QUESTION PRESENTED

Whether a caretaker can be required as a condition of eligibility for Aid to Dependent Children to prosecute

or cooperate in the prosecution of a deserting or abandoning parent for paternity and/or non-support.

STATEMENT OF THE CASE

A. HISTORY

This action was brought originally as an attack on New York Social Services Regulation 369.2 (f)(3)(ii)(e)[1] which required that mothers of needy and dependent children institute and prosecute actions of non-support against deserting fathers. The three-judge court held that this regulation was invalid as creating an additional requirement for Aid to Dependent Children eligibility not provided for in the Social Security Act 42 U.S.C. 601, *et. seq.* The Court's decision was based on a regulation issued by the Secretary of the Department of Health, Education and Welfare which stated that the federal NOLEO requirement was to have "no effect upon the determination of eligibility"[2] as well as this Court's affirmances of three NOLEO cases.[3]

[1] The full text of the regulation appears at Appendix p. 24.

[2] 45 C.F.R. §235.70. NOLEO is the acronym for Notice of Law Enforcement Officials, the procedure required of welfare officials re deserting and abandoning parents of AFDC recipients under 42 U.S.C. §602(a)(11).

[3] *Doe v. Swank*, 332 F. Supp. 61 (N.D. Ill. 1971) aff'd. *sub nom. Weaver v. Doe*, 404 U.S. 987 (1971); *Meyers v. Juras*, 327 F. Supp. 759 (D.Ore. 1971) aff'd. 404 U.S. 803 (1971) reh. den. 404 U.S. 961; and *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Calif. 1971), aff'd. *sub nom. Carleson v. Taylor*, 404 U.S. 980 (1971).

During the pendancy of the litigation on 369.2 (f)(3)(ii)(e), the New York State Legislature passed a new statutory NOLEO requirement (L. 1972 C. 687) codified in part as New York Social Services Law §101-a (2) & (3). Since the new NOLEO statute was not to take effect until September 1, 1972, the three-judge court did not treat its validity in its decision of June 7, 1972.

On appeal of the decision of the three-judge court by the New York State Department of Social Services, this Court vacated the judgment below and remanded the case to the three-judge court "for further consideration in light of Chapter 687 of the 1972 Laws of New York."

At the time of the remand the original named plaintiffs were no longer being proceeded against. Nor was regulation 369.2 (f)(3)(ii)(e) being enforced against the class. New York Social Services Law §101-a had replaced it. Since the policy being enforced was the same NOLEO condition of eligibility the three-judge court allowed the intervention of Anna Stuck and the amendment of the complaint to reflect the treatment she had received under 101-a. During the pendancy of the second round of litigation a new regulation was issued by the United States Department of Health, Education and Welfare purporting to allow the use of a NOLEO condition of eligibility against a caretaker, but not a child, recipient of ADC.[4] The three-judge court held September 26, 1974 that the HEW regulation was not a guidepost to be followed judicially and granted summary judgment to Anna Stuck declaring that 101-a was "void, unenforcible and without effect insofar as it makes recipient cooperation in a paternity or support

[4]Codified as 45 C.F.R. §233.90(b)(4)(i)(ii).

action against an absent parent a condition of eligibility for AFDC." Plaintiff's request for retroactive assistance for the period of her denial was refused. The opinion is reported at 365 F. Supp. 818 (1973). The decision was appealed by both defendants.

B. FACTS

The facts concerning the original named plaintiffs are as follows:

Sylvia Shirley, the mother of two infant daughters, did not wish to file a petition for non-support for fear it would ruin any possibility of reconciliation with her husband. In fact, her husband had informed her that if she took such a step he would file for divorce. Nonetheless the Onondaga County Department of Social Services refused her and her children welfare until she filed the non-support petition under 369.2 (f)(3)(ii)(e). Because of her brutal need for subsistence she complied on March 8, 1972. She attempted to withdraw the petition subsequently. Nonetheless in mid-April 1972 she was informed that her husband had filed for divorce. The divorce was granted by a Virginia Court later in the same year.

Elizabeth Anderson is the mother of an infant daughter. When her financial circumstances forced her to apply for welfare on January 15, 1972 she was told that she would have to file a petition of non-support against her husband. The filing of the petition was required as a condition of eligibility under 369.2 (f)(3)(ii)(e) notwithstanding the fact, which Mrs. Anderson made plain to the intake worker, that her

husband was a student whose sole source of income was a fellowship, and that he was providing regular support in the amount of $100.00 per month. She complied with the requirement since she needed the assistance to keep her daughter and herself alive. She moved to withdraw the petition subsequently but upon doing so she was informed that an order had been entered against her husband by Family Court in Long Island under the Uniform Reciprocal Support Act. Following the entry of this order her husband's support payments became sporadic.

Jane Doe and two of her children had received ADC since September, 1971. Her youngest daughter, Kirsten, became part of the assistance unit in October, 1971. On or about February 1, 1972, Mrs. Doe was informed that Kristen would receive no more assistance until Mrs. Doe took Kristen's father to Family Court and a support order was established. Mrs. Doe had instituted support proceedings against Kirsten's father in the fall of 1971. The matter had been placed on the "held" calendar at that time. Nonetheless Kirsten was terminated by the Onondaga County Department of Social Services for her mother's refusual to begin an entirely new proceeding notwithstanding the fact that the prior proceeding was still pending and that it had not resulted in the securing of full support payments. Kirsten received no welfare payments from March 1, 1972 until April 10, 1972 when counsel for the defendant Lascaris stipulated in open court to return Kirsten's grant since the Department had failed to comply with its own fair hearing procedure.

Anna Stuck intervened in the action after this Court's remand. She and her four infant children had

been receiving ADC since 1970. In February 1973 she was told by the Onondaga County Department of Social Services that her grant would not be continued unless she brought a paternity action against the father of her youngest daughter, Susan, or signed a statement authorizing the Department of Social Services to bring an action on her behalf. She would also be required to cooperate fully with the Department in such an action under pain of losing her assistance.

Anna Stuck did inform the Department of the name of Susan's father and the name of the small rural Western New York town in which he lived. She stated that she did not wish to file a paternity action against him and that she desired the agency not to do so. She felt that going through such a procedure would be fruitless, since Susan's father could not work due to a disability. She desired not to make a public issue out of the matter since such a proceeding would endanger her relationship with the father of her three older children. She had been required by the Department of Social Services to prosecute a paternity suit against this man when she first received welfare and she wanted to avoid the dissension and rancor which arises between parents when mother is forced to sue father. Her termination by the Onondaga County Department of Social Services was affirmed in a Fair Hearing decision dated March 7, 1973. The decision held that her declaration that she would not initiate paternity proceedings and that she desired that the agency not do so, coupled with her failure to give the Department the exact mailing address of Susan's father, constituted a lack of cooperation under Social Services Law §101-a sufficient to

terminate her public assistance.[5] She received no assistance for herself from March 7, 1973 until September 26, 1973.

ARGUMENT

I.

UNDER THE TOWNSEND DOCTRINE NEW YORK SOCIAL SERVICES LAW SECTION 101-a IS VOID FOR SETTING A CONDITION OF ELIGIBILITY FOR ADC NOT PROVIDED FOR BY THE SOCIAL SECURITY ACT.

New York Services Law §101-a requires applicants and recipients of public assistance to cooperate in the naming, locating and prosecuting of the non-supporting parents of ADC children. The States' power to establish conditions of eligibility was defined by this Court in *Townsend v. Swank:*

> [I]n the absence of congressional authorization for the exclusion clearly evidenced from the Social Security Act or its legislative history, a state eligibility standard that excludes persons eligible for assistance under federal AFDC standards violates the Social Security Act and is therefore invalid under the Supremacy Clause. *Townsend v. Swank*, 404 U.S. 282, 286, 92 S.Ct. 502, 505 (1971).

The Court has held on three different occasions that the NOLEO section of the Social Security Act does not

[5] Appendix at 117.

authorize conditions of eligibility.[6] The legislative history of these sections is devoid of discussion of conditions of eligibility.[7] By its affirmances in *Meyers, Taylor* and *Weaver*, the Court set the direction that has been followed by nineteen other federal courts.[8] It is

---

[6] *Meyers v. Juras*, 404 U.S. 303, 92 S.Ct. 91 (1971), pet. for rehearing denied 404 U.S. 803, 92 S.Ct. 91 (1971); *Carleson v. Taylor*, 404 U.S. 980, 92 S.Ct. 446 (1971); *Weaver v. Doe*, 404 U.S. 987, 92 S.Ct. 537 (1971).

[7] See the following two sections of this brief for a discussion of the legislative history.

[8] *Meyers v. Juras*, 327 F. Supp. 759, (D.Ore. 1971), aff'd 404 U.S. 303, 92 S.Ct. 91 (1971), Pet. for rehearing denied 404 U.S. 803, 92 S.Ct. 446 (1971); *Taylor v. Martin*, 330 F. Supp. 85 (N.D. Calif. 1971), aff'd *sub nom. Carleson v. Taylor*, 404 U.S. 980, 92 S.Ct. 446 (1971); *Doe v. Swank*, 332 F. Supp. 61 (N.D. Ill. 1971), aff'd *sub nom. Weaver v. Doe*, 404 U.S. 987, 92 S.Ct. 537 (1971); *Doe v. Shapiro*, 302 F. Supp. 761 (D.Conn. 1969), appeal dism'd 396 U.S. 488 (1970); *Doe v. Harder*, contempt, 310 F. Supp. 302 (D. Conn. 1970); *Woods v. Miller*, 318 F. Supp. 510 (W.D. Pa. 1970); *Doe v. Schmidt*, 330 F. Supp. 159 (E.D. Wisc. 1971); *Galindo v. Vowell*, (consent j'ment) Civ. 5A-71-CA-248 (W.D. Tex. 1971); *Doe v. Wohlgemuth*, (T.R.O.) Civ. Act. No. 1958 (W.D. Pa. 1971); *Saiz v. Goodwin*, 325 F. Supp. 23 (D. New Mex. 1971), rem'd. 450 F.2d 788 (10th Cir. 1971), 340 F. Supp. 165 (D. New Mex., 1971); *Saddler v. Winstead*, 332 F. Supp. 130 (N.D. Miss. 1971); *Chee v. Graham*, Civ. 70-532 Phx. WEC (D. Ariz. 1971); *Doe v. Lavine*, 347 F. Supp. 357 (S.D.N.Y. 1972); *Lewis v. Lavine*, ____ F. Supp. ____ (S.D. N.Y. 1972); *Doe v. Ellis*, 350 F. Supp. 375 (D. S.C. 1972); *Story v. Roberts*, 352 F. Supp. 473 (D.C. Fla. 1972); *Doe v. Rampton*, ____ F. Supp. ____ (D.C. Utah 1973); *Doe v. Burns sub nom. Doe v. Gillman*, 479 F.2d 646 (8th Cir. 1973); cert. filed Sept. 4, 1973; *Messer v. Flowers*, Preliminary inj. Civ. No. 74-117-CH (S.D. W.Va. May 10, 1974); *Newman v. Mary*, (T.R.O.) Civ. No. 74-934, Section I, (E.D.La. Apr. 24, 1974); *Godfrey v. Stanton*, Civ. No. 72-F-77 (N.D. Ind. June 8, 1973); as well as the two opinions in the instant case. In two other cases regulations were withdrawn upon the filing of the complaints. *Doe v. Kurtis*, 306 F. Supp. 509 (S.D. N.Y. 1969); *Magness v. Davidson*, Civ. 71-1263-HM (D.Md. 1972).

submitted that the affirmances in the three NOLEO cases were proper given the merits of the cases and that those cases should be afforded a high level of precidental value. Unlike the case of *Jordan v. Edelman*[9] in which the Court assigned a low value to the previous affirmances which had dealt obliquely with the Eleventh Amendment argument, the instant case is fully on point with the major issue decided in *Meyers, Taylor* and *Weaver*. The question on the merits of each of these four cases is the validity of NOLEO conditions of eligibility. That question was met four-square each time the Court reaffirmed one of these cases; it was not a peripheral issue which might have been given less than full attention. Nor were these cases decided on a constitutional basis. In each case the Court chose to decide the matters on statutory grounds notwithstanding the existence of substantial constitutional claims within each case. Legislative action is entirely possible within the area. Thus under Mr. Justice Brandeis' teaching in *Burnet*, there is a good reason to follow the three affirmances.[10] Not only is the law settled, it is settled right. The decisions should be afforded the weight of decisions on the merits and the instant case should accordingly be affirmed.[11]

In *Carleson v. Remillard* the Court unanimously reaffirmed the *Townsend* doctrine:

---

[9] *Jordan v. Edelman*, ___ U.S. ___, 94 S.Ct. 1347 (1974).

[10] *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406-408, 52 S.Ct. 443, 447 (1932) dissenting opinion.

[11] See *Serrano v. Priest*, 96 Cal. Rptr. 601, 624 (1971); Note, Summary Dispositions of Supreme Court Appeals, 52 Boston University Law Review 373, 412 (1972).

> In Townsend, we also expressly disapproved the HEW policy which permitted States to vary eligibility requirements from the federal standards without express or clearly implied congressional authorization. *Carleson v. Remillard*, 406 U.S. 598, 601 92 S.Ct. 1932, 1934 (1972).

Appellants allege that the *Dublino* case has modified this cornerstone of welfare law.[12] In fact, *Dublino* reasserts the validity of the *Townsend* doctine. Where State law excludes people from AFDC benefits whom the Social Security Act provided would be eligible and where there is no room in the Act's language or legislative history to warrant the State's additional eligibility requirements then the eligibility requirement fails. That of course was not the case in *Dublino* since the 1967 Amendments to the Social Security Act specifically set forth conditions of eligibility as part of the Work Incentive Program. It is however the situation presented by the instant case. As Appellant Lavine's brief in this Court admits at page 42, the express provisions of 42 U.S.C. §602(a)(11) "appear to preclude denial of assistance to the child." Of course denying the caretaker is the same as denying the child. If any requirement for violation of a specific clause of the Social Security Act exists as a result of *Dublino* it is met by section 602(a)11 and 17.

Appellants reading of *Dublino* is dangerously overboard. They, and the administrators of the Social and Rehabilitation Service in HEW, would like to believe that *Dublino* allows States to set up *any* conditions of eligibility they may desire as long as it contributes to

[12] *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 93 S.Ct. 2507 (1973).

"efficiency of administration" and does not violate an express provision of the Social Security Act.[13] This is in fact the converse of the *Townsend* doctrine which is that need and dependency are the only conditions of eligibility for AFDC except those standards which appear expressly in the Social Security Act or its legislative history.

The objective of efficiency of administration cannot be allowed to bloat so large as to obscure the fundamental purpose of the Act. Denying otherwise eligible families in the interest of greater efficiency of administration defeats the Congressional purpose of aiding needy families. *Dublino* cannot stand for the usurpation of Congressional program and power to shortsighted bureaucratic interests. The Secretary in his regulation has misdiagnosed the effect of *Dublino* on the *Townsend* doctrine. *Dublino* does not stand for the proposition that States may set any condition for eligibility they desire. In fact, the Court in *Dublino* said simply that the New York Work Rules were not preempted by the WIN Program, and the question of whether individual rules conflicted with the Social Security Act was remanded to the court below. This Court specifically refused to do what the secretary asserts it did.

Wyman v. James, 400 U.S. 309, 91 S.Ct. 381 (1971) and *Snell v. Wyman*, 393 U.S. 323, 89 S.Ct. 553 (1969) continue to be distinguishable as cases dealing with eligibility requirements outside the NOLEO sphere. Both cases were decided before *Townsend v. Swank* and

---

[13]See 39 Fed. Reg. May 8, 1974, 16362. Final regulation appears at 39 Fed. Reg. July 24, 1974, 26912.

the NOLEO affirmances. Consideration of the earlier cases failed to preclude the *Townsend* doctrine or the NOLEO results. *Wyman v. James* was a constitutional determination that the Fourth Amendment did not forbid home visits by welfare workers to recipients' residences. *Snell v. Wyman* dealt with available resources, not the counting of contingent or possible resources in determining eligibility. Appellant Lavine would have us believe that he is required to count possible future support payments as present resources in the determination of eligibility. However, 42 U.S.C. §602(a)(7) allows consideration of recipients income and resources and the income and resources of other individuals *living in the home* of the recipient only. By definition this does not include non-supporting, deserting or abandoning parents. Additionally, resources, in order to be considered, must be actually and presently available to the applicant for assistance. 45 C.F.R. §233.20(a)(3)(ii); Handbook of Public Assistance Administration §3120 and 3124; 18 N.Y.C.R.R. §352.16, 352.23 and 351.37. Where location of an absent parent, pursuit, prosecution, and enforcement of court orders all stand between the child and the actual receipt of the support payment, such potential monies cannot be considered presently available. Counting such support payments in determining eligibility is considerably different from the taking of liens on real property and personal injury recoveries or the taking assignments of insurance proceeds countenanced by *Snell*.

The *Townsend* doctrine remains the law. *Wyman v. James* and *Snell v. Wyman* do not change the illegality of a NOLEO condition of eligibility any more than *Dublino* does.

II.

THE CLAIM THAT NEW YORK SOCIAL SERVICES LAW 101-a PENALIZES ONLY THE CARETAKER AND NOT THE CHILDREN IS "UNREALISTIC" AND DOES NOT REMEDY THE ILLEGAL CONDITION OF ELIGIBILITY

New York has attempted to salvage its illegal NOLEO condition of eligibility by claiming that the statute only operates to deprive the caretaker of assistance and not the children. Judge Port speaking for the three-judge court below termed the distinction "unrealistic". *Shirley v. Lavine*, 365 F. Supp. 818, 822 (1973). The web of legislative history woven in Appellant Lavine's brief in an attempt to convince the Court that Congress intended not to benefit the caretaker but only the children is gossamer.

At its inception the Social Security Act did not provide for the needs of the caretaker; allowances existed for the children only. As early as 1941 the Social Security Board, the predecessor of the Department of Health, Education and Welfare, recognized that an individual child's needs might "under certain circumstances . . . comprehend requirements that also serve the welfare of other individuals in the household." Payments were made for "common household expenses if the maintenance of such household was necessary to the welfare of the recipient." Social Security Board RFL 331, Item 197 (Aug. 9, 1941).

The 1950 Amendments to the Social Security Act, the very amendments which created the NOLEO program, expanded the Aid to Dependent Children

Program to include caretaker relatives. 42 USC §606(b)(1). The proposal was made by the Administration. The Commissioner of Social Security, Arthur Altmeyer, stated to the House Ways and Means Committee that the goal of the ADC program should be "to provide adequately not only for the children but also for the parents or other relatives caring for the children and for the expense of maintaining the home." House Committee on Ways and Means, Hearings on H.R. 2892 and H.R. 2893, 81st Cong., 1st. Sess. 14 (1949). Other witnesses testified that the caretaker grants were necessary because in situations where other funds were not available to the caretaker he or she is forced to share in the meager payments made to the child. The situation is made even more difficult by the fact that caring for the child itself prevents the caretaker from working. *Id.* at 399.

In reporting out the bill both the Majority and Minority supported the granting of aid to the caretaker. The Majority Report explained the rationale:

> In the present law aid to dependent children is defined as payments with respect to a dependent child. No specific provision is made for the need of the parent or other relative with whom the child is living. Particularly in families with small children, it is necessary for the mother or another adult to be in the home full time to provide proper care and supervision. Since the person caring for the child must have food, clothing and other essentials, amounts allotted to the children must be used in part for this purpose or no other provision is made to meet her needs . . . To correct the present anomalous situation wherein no provision is made for the adult relative and to enable States to make payments that are more

> nearly adequate, the bill would include the relative with whom the dependent child is living as a recipient for Federal matching purposes. H.R. Rep. No. 1300, 81st Cong. 1st Sess., 45 et. seq. (1949); U.S. Serial 6-11301.

The Minority Report echoed this concern:

> We also favor extending Federal Participation to the adult 'caretaker' of a dependent child as provided for in the bill. This will result in better care for the child and in the more equitable apportionment of Federal funds among these depending groups." *Id.* at 170.

Representative Forand supported the provision on the floor of the House:

> [T]he relative caring for the children must have food, clothing and other essentials, [and the assistance presently] allotted to the children under present law must be used in part for this purpose if such relative does not have any income or is not provided aid from some other source. 95 Cong. Rec. 13932 (1949).

While the Senate Finance Committee sought to delete the provision as a means of cutting welfare spending the full Senate refused and adopted an amendment extending assistance to caretakers. 96 Cong. Rec. 8485 (1950). The policies behind this extension were stated clearly by Senator Lehman of New York:

> This proposal is a simple matter of humanity, common sense and justice. It is obviously neither humane nor sensible to make provision for children who are needy because of the death, disability or desertion of the family breadwinner and fail to make provision for the mother of such children. This is particularly true in view of the pitiful inadequacy of the Federal funds now made available for such children. 96 Cong. Rec. 8794 (1950).

Plainly then the 81st Congress recognized the necessity of providing for the needy caretaker as well as the dependent children in the ADC program. With a historical record of this clarity it is to be expected that if the same Congress had wished the NOLEO provisions to be used as a condition of eligibility for the caretaker, but not the children, it would have said so explicitly. Of course the 81st Congress said nothing at all about an NOLEO eligibility condition. The silence exists because the NOLEO scheme required notice to law enforcement officials and not forced prosecutions and coerced cooperation from the caretaker. Congress never intended the NOLEO provision to be treated as conditions of eligibility. The Congressional purpose was to strengthen family life not to destroy the emotional bond of the family by requiring one family member to appear against another family member as an adversary in a courtroom.

The Congressional purpose has remained constant through the years. In 1962 Congress officially changed the name of the program to "Aid to *Families* with Dependent Children" Pub. L. 870543 (July 25, 1962); 42 USC §601 (emphasis supplied). As Justice Stewart noted in *Dandridge v. Williams*, this change and the other references to families added in 1962:

> show that Congress wished to help children through the family structure. The operation of the statute itself has this effect. From its inception the Act has defined 'dependent child' in part by reference to the relatives with whom the child lives. When a 'dependent child' is living with relatives, the 'aid'

> also includes payments and medical aid to those relatives . . . The States must respond to this federal statutory concern for preserving children in a family environment. 397 U.S. 479 et seq.

In 1967 when Congress was creating additional eligibility requirements in the Work Incentive Program it held fast to its aim of strengthening family life. New NOLEO related provisions were added (42 USC §602(a) 17, 18, 21, 22) but none were specified to be conditions of eligibility as the work rules were (42 USC §602(a)(19)(F)).

The Congressional intent remains the same today. Bills have been proposed from time to time that would impose a condition of eligibility in the NOLEO procedures. None have passed both Houses. See H.R. 3153 §151(c)(3)(5) passed by Senate 93d Cong., 1st Sess. (1973).

New York seeks the sanction of this Court for the distinction between terminating aid to caretakers of ADC families and terminating aid to children of those families. The distinction has been recognized as a chimera since the beginning of the NOLEO litigation . In *Doe v. Harder* (supra) the Connecticut State Welfare Commissioner was held in contempt of the *Doe v. Shapiro* decision for attempting such a ruse. Judge Mansfield declared the distinction an illusion when the instant case was first argued:

> We also feel that the distinction based upon the fact that here the aid would be denied to a mother instead of directly to the child is an illusory one. The program being administered here, by its very title is 'Aid to families to dependent children.'

> And Section 401 of the Social Security Act, that is 42 U.S.C. 601, refers repeatedly to the motivation which is to furnish financial assistance to dependent children and the parents or relatives with whom they are living. Particularly as a practical matter, and I think counsel all did concede this, that the denial of the relief, would visit just as much harm and hardship upon the child because it would be unrealistic not to appreciate that the mother would then be forced to turn to the portion allocated to the child in order to support the family unit. *Shirley v. Lavine* oral opinion June 7, 1972, p. 12

The New York Statute is simply the same old condition of eligibility dressed up in new clothes, a condition which has uniformly been held by this Court and courts across the nation to be at variance with the Social Security Act. The legislative history demonstrates that Congress did not intend the NOLEO provisions to be used as conditions of eligibility. The fact that the condition is applied to the caretaker instead of the children does not avoid that vice. New York Social Services Law §101-a conflicts with the Social Security Act and is therefore void and unenforcible.

III.

BECAUSE CONGRESS NEVER INTENDED THE NOLEO PROVISIONS TO BE CONDITIONS OF ELIGIBILITY THE AMENDMENT 45 CFR §233.90 IS NOT A GUIDEPOST TO BE FOLLOWED JUDICALLY

Prior to 1950 there was no NOLEO provision within the Aid to Dependent Children title of the Social

Security Act. In the 1950 amendments to the Social Security Act, Congress added sections providing for ADC allowances to include payments for the caretaker's needs, for applications to be acted on with reasonable promptness, for fair hearings for aggrieved applicants and recipients, and for notice to law enforcement officials of the furnishing of ADC to families in which a child has been deserted or abandoned. 42 USC §606(b)(1), 602(a)(10), 602(a)(4), 602(a)(11).

The NOLEO mechanism was strictly limited. The House and Senate Reports described what it was:

> Section 321(b) of the bill amends Section 402(a) of the Social Security Act by the addition of a new clause (10) effective July 1, 1952 which would require an approved State plan for aid to dependent children to provide for prompt notice to appropriate law enforcement officials in any case in which aid to dependent children is furnished to a child who has been deserted or abandoned by a parent.
>
> The bill is the same in this respect as the House bill except for the change in the effective date necessitated by the passage of time. S. Rep. No. 1669, 82d Cong., 2d Sess. 172 (1950); U.S. Serial 11368.[14]

At no point in the legislative history of this amendment is there any discussion of cutting off the caretaker relative for not complying with the requirement. In fact, there was nothing the recipient had to do under the amendment. The only action mandated was for the State Welfare Department to turn over to the

[14]The House Report tracks the language of the Senate Report with the exception of the last paragraph. H.R. Rep. No. 1300, 82d Cong., 1st Sess. 38 (1949); U.S. Serial 6-11301.

Law Enforcement Officials a list of those who were receiving ADC and who had an absent or deserting parent. Indeed, in a spirit of concern for the recipient's dignity and emotional stability, the recipient was to be informed of the requirement of referring so that the recipient herself could then decide if she wished to continue to receive public assistance under such circumstances. Handbook of Public Assistance Administration Part IV, §8120 para. 5 (1951) and see §8146.[15]

The administrative reading of Congress's intent not to make the NOLEO provision a condition of eligibility is made very plain in the Handbook section on eligibility:

> The amendment does not make the assistance agency responsible for filing a complaint or initiating or pressing a suit against a deserting parent. (The scheme is for the law enforcement officials to do that.) Neither does it make the agency responsible for requiring the applicant to take action against the deserting parent *or for making eligibility for assistance conditional upon action by the applicant.* Handbook §8120. (emphasis supplied).

The Handbook goes on to reinforce the point:

> Congressional action was clear with regard to the difference between public assistance administration and law enforcement, and did not place upon the public assistance agencies responsibility for enforcing support. The public assistance job is seen as that of providing eligible children with the assistance they need; *and it is not the intent of the*

[15]The Handbook of Public Assistance Administration continues to be valid unless it is directly superseded by contrary provisions of the Code of Federal Regulations. Its value in helping to interpret Congressional intent continues undiminished.

> *legislation to deprive needy children of assistance in order to punish their parents for neglect of their duties.* Although accepting assistance involves notice to the law enforcement officials if a parent has deserted or abandoned his child, *the amendment does not impose an additional eligibility requirement.* This is clear in the wording of the provision which requires notice that aid has been furnished 'in respect of a child who has been deserted or abandoned by a parent'. *Ibid.* (emphasis supplied)[16]

According to the Handbook, Congress's thinking in this area was non-punative and non-coercive.[17] Congress recognized that a parent deserted by her spouse and left to fend alone for herself and her infant children was in a delicate and stressful situation. Thus the Handbook urges social work rather than coercion:

> The financial obligations of parents are necessarily discussed in connection with eligibility. Actual and potential resources will have been reviewed with the parent caring for deserted or abandoned children (and, if possible, with both parents) and tentative agreements reached for utilizing existing resources and further developing potential resources. *The fact that assistance is available to the family during the period in which the parents are*

---

[16]See Codification at 45 CFR §235.70.

[17]It is axiomatic that the construction of the act by those charged with administering it is entitled to great weight, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), especially when such construction was contemporaneous with the statute, *Norwegian Nitrogen Products v. United States*, 288 U.S. 294 (1933), and has been applied over a long period of time. *United States v. Shreveport Grain and Elevator*, 287 U.S. 77 (1932).

> *being helped to work out more permanent plans enhances the opportunity for sound planning and for maintaining for the children some degree of stability and security. Id.* at §8146 (emphasis supplied).[18]

The aim of the NOLEO program was to bolster the family unit while seeking to encourage the absent parent to undertake his responsibilities to his family. The law enforcement officials were to be made specifically aware of this goal. *Id.* at §8141. The fact that deserted parents might have a reluctance to bring charges against a family member was recognized and agencies were instructed to provide training to that the workers might understand the emotional factors in family breakdown and reconciliation and to act in a supportive role in such times of stress. *Id.* at §8148. Not only did the NOLEO amendment itself not present a condition of eligibility, but the Handbook, in construing the intent of Congress, specifically advised States against promulgating legislation which would conflict with the purposes of the ADC program.

---

[18] Of course the NOLEO requirements as interpreted do not change the primary obligation of parents to support their children. However, the ADC program is a recognition of the fact that dependent children are not always supported by their parents. As the Handbook indicates, it is when the primary obligation is not being met that the AFDC program becomes available to help a family out of its destitution. Notice to Law Enforcement Officials is simply one way of attempting to see that the primary obligation is enforced; it certainly is not an attempt to subvert that obligation, rather it is a recognition that families need money and social services to survive when the parent deserts his family and until he becomes able or willing to fulfill his obligation of support.

> In most instances, States should be able, without changes in State laws, to carry out this requirement of the Federal act by issuing the necessary rules and regulations. The Bureau advises against legislation that makes the actual commencement of action on the part of a parent to obtain support from the parent who had deserted or abandoned his children a condition of eligibility. Such provisions deprive needy children, who would otherwise be eligible, of the right to receive aid to dependent children pending the commencement of action to obtain support from the absent parent. *Id.* at §8149.

The Congressional emphasis on providing social work and constructive rehabilitative services to help people off the welfare rolls continued in the next set of amendments to the Social Security Act in 1962.[19]

---

[19]The Senate Report demonstrated the continued commitment:

> A. IMPROVEMENT IN SERVICES TO REDUCE OR PREVENT DEPENDENCY
>
> The Committee bill is designed to improve the rehabilitative aspects of the public assistance programs particularly in stimulating constructive services designed to help families and individuals to attain self-sufficiency. The committee is convinced that much can be done to relieve the undesirable effect on the community of a large and growing number of persons now on assistance. The number of illegitimate births has been increasing and indications are that family break-up by reason of desertion, divorce, and separation have also increased significantly in the population as a whole, as well as among public welfare recipients. Experience has shown that services by highly trained welfare personnel can help these situations. These social services, usually provided by trained social workers, or workers employed under the direction of social workers are designed to help families and individuals to become self-supporting rather than dependent upon welfare checks. S. Rep. No. 1589 81st Cong., 2d Sess. p.7 (1962). 1962 United States Code Congressional Administrative News 1943 at 1949.

There was no provision made in these amendments which would have required a change in the approach to the NOLEO area set forth in the Handbook. Indeed, the legislative history reflects no discussion of any such change.

In 1967 Congress again spoke to the problem of pursuing support from the deserting parents of dependent children. In the Amendments to the Social Security Act of 1967, Congress sought to strengthen the existing NOLEO procedure. But it did not provide for a NOLEO related condition of eligibility. A summary of goals of the amendments and the changes in the AFDC program required to effectuate them, is set forth in the House Report:

> To bring unsuitable home conditions of children to the attention of the courts or law enforcement agencies; to develop a program through a single organizational unit to establish paternity of illegitimate needy children (in order to get support payments from the fathers); to utilize reciprocal support arrangements with other states to enforce court support orders for deserted children; and to enter into cooperative arrangements with the court to carry out these arrangements. H.R. Rep. No. 544, 90th Cong. 1st Sess., 4 (1967).

The amendments provided that the Department of Health, Education and Welfare and the Social Security Administration therein were to provide courts with addresses of deserting or abandoning parents. *Id.* at 10. The Senate had proposed a scheme in which support payments would be considered a debt to the United States and would be collected by the U.S. Treasury by utilizing the Internal Revenue Service's extensive bank of information on taxpayers as well as its ability to

impose priority liens. S. Rep. No. 744, 90th Cong., 1st Sess. 160 et. seq. (1967); U.S. Serial 12752-2.[20] Thus two new information gathering devices were to be made available: Social Security records and the taxpayers records of the I.R.S. These systems were to feed into the single state unit which was to coordinate the work with the law enforcement officials and the courts. At no point in the legislative history is there mention of a new information gathering device of conditioning eligibility upon the caretakers cooperation in the prosecution of the absent parent. See House Report 544 *op. cit.*, Analysis Section by Section at 172.

Immediately after passage of the Amendments, Senator Mansfield congratulated the Congress on continuing to seek to strengthen family life through the provision of social services by agency social workers. The non-coercive approach which had existed in the 1950 and 1962 amendments was reaffirmed. 113 Cong. Rec. 36925 (1967). Senator Mansfield pointed out that the bill required the use of the "existing legal machinery to locate the absconding individual and hold him accountable for the money he should pay for the support of his children." *Ibid.*

The "existing legal machinery" did not include the device of coerced cooperation as a condition of eligibility. There can be no doubt that the 90th Congress knew what a condition of eligibility was and that it knew how to create such a condition in the AFDC program. The 1967 amendments set up a new Work Incentive Program which required certain recipients of AFDC to work as a condition of eligibility for

[20]See Congressman Mills' remarks, 113 Cong. Rec. 36368 (1967).

public assistance. Failure by the recipient to follow the rules of the Work Incentive Program was grounds for termination of public assistance. 42 U.S.C. §602(a)(19). See *New York Department of Social Services v. Dublino*, 412 U.S. 405 (1973). Indeed Senator Long, the floor manager of the 1967 amendments, discussed making the work requirements conditions of eligibility. 113 Cong. Rec. 32592 et seq., (1967). But in his discussion of the NOLEO related amendments he specifically indicated, under questioning from Senator Kennedy of New York, that the establishment of paternity was not a condition of rendering Aid to the Families of Dependent Children. 113 Cong. Rec. 33540 (1967). Senator Long reiterated that the approach to non-support was the same non-coercive Notice to Law Enforcement Officials. "It is a purpose of the provision of our bill just as it was the purpose of the provision in the House bill, that the State agency should seek to obtain support from a father who has abandoned his children and left them on welfare." *Ibid.* No new condition of eligibility was created, instead Long pointed out that emphasis continued to be on providing the caretaker with services so she could overcome her dependency:

> We said we will do the best we can. We will offer training to these mothers. We will give them lawyers to help them go to court and get alimony from their husbands. We will provide subsidized employment. We will make contracts with the hospitals and universities to help them clean up the slums or grounds. 113 Cong. Rec. 33541 et. seq. (1967).

Senator Long said the amendments would give caretakers lawyers to *help* them go to court. He did

not say that the bill required mothers to go to court upon pain of losing their public assistance.

There have been no additions to the Social Security Act in the NOLEO area since 1967. This then is the legislative history: A history of supplying services and social work to a caretaker faced with the emotional trauma of desertion and the destitution of abandonment. A history of seeking to strengthen family life by recognizing the reluctance of a caretaker to bring suit against a family member. A history of referring the pursuit of support payments to governmental units with special resources designed to trace abandoning parents and enforce support obligations. It is on this basis that suddenly, without any further expression of Congressional intent, HEW on May 3, 1973, on the request of Appellant Lavine, reversed itself and promulgated 45 CFR §233.90 allowing the use of the NOLEO requirement as a condition of eligibility for the caretaker relative. Plainly the three judge court below was correct when it concluded:

> [The] unbroken line of court decisions construing these provisions and the absence of any Congressional corrective action persuade us that the agency's new interpretation is in error and not a guidepost to be followed judically. *Shirley v. Lavine*, 365 F. Supp. 818, 825 (1973).

CONCLUSION

The decision of the three-judge court below should be affirmed and New York Social Services Law §101-a should be declared void and unenforceable as presenting a condition of eligibility not set forth in the Social Security Act.

Respectfully submitted,

ISADORE GREENBERG, COUNSEL OF RECORD
DOUGLAS A. ELDRIDGE, OF COUNSEL
Onondaga Neighborhood Legal Services, Inc.
633 South Warren Street
Syracuse, New York 13202
(315) 475-3127

Supreme Court, U. S.
FILED
DEC 4 1974
MICHAEL RODAK, JR., CLERK

(137-E)

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANT LAVINE

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Appellant Lavine
The Capitol
Albany, New York 12224
Telephone: (518) 474-7178

RUTH KESSLER TOCH
Solicitor General of the State of New York

ALAN W. RUBENSTEIN
Principal Attorney, State of New York
of Counsel

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-8087

INDEX.

PAGE

The Legislative History of H.R. 3153 (Appellee's Brief, p. 17) supports the position of appellants that it was not the intention of Congress to shift parental support responsibilities from parents to the State 2

Conclusion. The Order Appealed from should be reversed and New York Social Services Law § 101-a (2) (3) should be declared valid and constitutional in all respects 7

CASE CITED.

Saiz v. Goodwin, 325 F.Supp. 23 (D.N.Mex., March 5, 1971), vacated and remanded 450 F.2d 788 (10 Cir., November 9, 1971), decision after remand (sub. nom. Saiz v. Hernandez) 340 F.Supp. 165 (D.N.Mex., March 16, 1972) 5

STATUTES.

New York Social Services Law § 101-a(2)(3) 4, 7
Public Law 93-233 3

42 U.S.C.:

§ 602 (a) (7) 1
§ 602 (a) (11) 4
§ 602 (a) (11) (17) (18) (21) and (22) 2
§ 602 (a) (17) (18) (21) and (22) 4
§ 602 (a) (17) (18) (21) and (22), Section 402 (a) (17) (18) (21) and (22) 4
§ 602, Section 402 4
§ 606, Section 406, subdivision f 4
§ 610, Section 410 4
Social Security Act, Part A of Title IV 3

MISCELLANEOUS.

H.R. 3153 ..... 2, 3
Section 151 3
H.R. 11333 3
Senate Report No. 93-553 to accompany H.R. 3153 2
Senate Report No. 92-1230, dated September 25, 1972 accompany H.R. 1, at pp. 467 and 468 5

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,

Appellant,

v.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

REPLY BRIEF FOR APPELLANT LAVINE

This brief is submitted on behalf of appellant Lavine in reply to the brief for appellee Stuck. Aside from directing the Court's attention to appellee's obvious misreading of the provisions of 42 U.S.C. § 602(a)(7) (Appellee's Brief, p. 12), and to avoid being merely argumentative, there is only one matter to which we wish to address ourselves.

The Legislative History of H.h 3153 (Appellee's Brief, p. 17) supports the position of appellants that it was not the intention of Congress to shift parental support responsibilities from parents to the State.

That the Congressional purpose and intent underpinning the provisions of 42 U.S.C. § 602(a) (11) (17) (18) (21) and (22) is as we have urged in our main brief (Appellants' Brief, pp. 16-32) further demonstrated by a reading of Senate Report No. 93-553 to accompany H. R. 3153 to which appellee refers at page 17 of her brief.

Senate Report No. 93-553 summarizes the Senate bill as follows:

> "The bill as passed by the House would make a number of minor, clerical, and conforming changes in the Social Security Act to correct errors and oversights in the Social Security Amendments of 1972. The Committee amendment incorporates a number of substantive provisions affecting social security cash benefits, the Supplemental Security Income program, social services, child welfare services, child support, Aid to Families with Dependent Children, Medicare and Medicaid. The Committee bill also establishes a new tax credit for low-income workers with children and, to pay the cost of the tax credit, deletes the income tax itemized deduction for State and local gasoline taxes. A summary of the Committee amendments follows." (Senate Report, p. 1.)

The "Summary" states, as to "Child Support":

> "CHILD SUPPORT
>
> Present law requires that the State welfare agency establish a single, identified unit whose purpose is to secure support for children who have been deserted or abandoned by their parents, utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support. If it is necessary to

establish paternity to find an obligation to support, this unit is supposed to carry out this activity. The State welfare agency is further required to enter into cooperative arrangements with the courts and with law enforcement officials to carry out this program. Access is authorized to both Social Security and (if there is a court order) to Internal Revenue Service records in locating deserting parents. The administration of the provisions of present law has varied widely among the States.

The Committee bill includes a number of features designed to assure an effective program of child support. The Committee bill leaves basic responsibility for child support and establishment of paternity to the State but it envisions a far more active role on the part of the Federal Government in monitoring and evaluating State programs, in providing technical assistance, and, in certain instances, in undertaking to give direct assistance to the States in locating absent parents and obtaining support payments from them.

States would be required to have effective programs for the collection of support and the establishment of paternity; Federal matching for these efforts would be increased from the present 50 percent to 75 percent but States not complying with the requirements would face a penalty in the form of reduced Federal matching funds for Aid to Families with Dependent Children.

Access to support collection services would be available to families not on welfare as well as to those on welfare." (Report, pp. 6, 7.)

The "minor, clerical and conforming changes in the Social Security Act" were accomplished through passage of H. R. 11333 on December 31, 1973 (Public Law 93-233). H. R. 3153, however, is believed to remain in conference.*

* The provisions of H.R. 3153 relating to "Child support and establishment of paternity" are to be found in section 151 of H.R. 3153 commencing at page 90 of the bill. The proposed amendments to Part A of Title IV of the Social Security Act are to be found

(Footnote continued on following page)

The Senate Committee was obviously concerned with the fact that the 1950 NOLEO amendments (42 U.S.C. § 502(a) (11)) and the 1967 amendments (42 U.S.C. § 602(a) (17) (18) (21) and (22)) had proven to be ineffective. (See pages 41 and 48 of the Report). The Report states:

> "In view of the fact that most States have not implemented in a meaningful way the provisions of present law relating to the enforcement of child support and establishment of paternity, the Committee believes that new and stronger legislative action is required in this area which will create a mechanism to require compliance with the law. The major elements of this proposal have been adapted from those States which have been the most successful in establishing effective programs of child support and establishment of paternity.
>
> The Committee bill builds upon the provisions of existing law which are basically sound. It mandates more aggressive administration at both the Federal and local levels with various incentives for compliance and with penalties for noncompliance." (Report, p. 43.)

The Committee's comments with regard to "Establishing Paternity" show beyond doubt that New York Social Services Law § 101-a(2) (3) accomplishes precisely the purposes which the Senate intended to accomplish. The Report states:

> "The Committee is concerned at the extent to which the dependency on AFDC is a result of the increasing number of children on the rolls who were born out of wedlock and for whom parental support is not being provided because the identity of the father has not

---

(Footnote continued from preceding page)
commencing at page 111 of the bill. These include proposed amendments to section 402 (42 U.S.C. section 602), insertion of a new subdivision (f) in section 406 (42 U.S.C. section 606), and the proposed repeal of section 402(a) (17) (18) (21) and (22) (42 U.S.C. section 602(a) (17) (18) (21) and (22)), as well as section 410 (42 U.S.C. section 610) of the Act.

been determined. The Committee believes that an AFDC child has a right to have its paternity ascertained in a fair and efficient manner unless identification of the father is clearly against the best interests of the child. Although this may in some cases conflict with what a social worker considers the mother's short-term interests, the Committee feels that the child's right to support, inheritance, and to know who his father is deserves the higher social priority. In 1967, Congress enacted legislation requiring the States to establish programs to determine the paternity of AFDC children born out of wedlock so that support could be sought. The effectiveness of this provision was greatly curtailed both by * * * *and also by early court interpretations of Federal law which prevented State welfare agencies from requiring that a mother cooperate in identifying the father of a child born out of wedlock.* Later court decisions, however, have made it clear that such aid could be denied to a noncooperating mother." (Emphasis supplied.)* (Report, p. 48.)

Finally, see Senate Report No. 92-1230, dated September 25, 1972, to accompany H.R. 1, at pp. 467 and 468 where the Senate Finance Committee stated:

"COOPERATION OF MOTHER IN IDENTIFYING THE FATHER AND SEEKING SUPPORT PAYMENTS

Present law.—The Congress has written into the Social Security Act a provision requiring the State welfare agency 'in the case of a child born out of wedlock who is receiving Aid to Families with Dependent Children, to establish the paternity of such child.'

Court action.—Despite this clear legislative history, a U.S. district court in August 1969 (*Doe* v. *Shapiro*, 302 F Supp. 761), ruled that a mother's refusal to name the father of her illegitimate child could not result in denial of Aid to Families with Dependent

* See *Saiz* v. *Goodwin*, 325 F.Supp. 23 (D.N.Mex., March 5, 1971), vacated and remanded 450 F.2d 788 (10 Cir., November 9, 1971), decision after remand (sub. nom. *Saiz* v. *Hernandez*) 340 F.Supp. 165 (D.N.Mex., March 16, 1972).

Children. The applicable State regulation was held to be inconsistent with the provision in Federal law that AFDC be 'promptly furnished to all eligible individuals,' on the grounds that the State regulation imposed an additional condition of eligibility not required by Federal law.

The dissenting opinion stated:

> Unless the principle of personal parental responsibility is to be abandoned, as an obsolete cornerstone for gauging welfare eligibility, a full disclosure is a necessary and implied governmental prerogative, which requires the applicant to disclose all relevant information. Absent this personal responsibility and cooperativeness between the applicant-mother and the government, the effectiveness of the program would be seriously challenged because she is the sole source of this information; and without it the system designed to establish paternity could not function. • • •
>
> Congress created this system which required only the identity of the father to allow enforcement officials with the assistance of the Internal Revenue Service and the social security files, to locate an absconding father. It is one of the very few occasions when the information in those records is statutorily made available for use outside the agencies' official business. Could it be that Congress contemplated this elaborate system would be paralyzed by an uncooperative applicant-mother who could still successfully insist that she be paid her full monetary allotment?

Committee provision.—The committee's answer to this question is an emphatic 'No!' The provisions of the committee bill related to child support and establishing paternity are described in greater detail in chapter X of this report (see 501 ff.), but it is appropriate to note here that the committee bill would require, as a condition of eligibility, that a mother cooperate in efforts to establish the paternity of a child born out of wedlock, cooperate in seeking support payments from the father, and assign the right to collect support payments on her behalf to the Government."

CONCLUSION

The Order Appealed from should be reversed and New York Social Services Law § 101-a(2)(3) should be declared valid and constitutional in all respects.

Dated: November 25, 1974.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York

RUTH KESSLER TOCH
Solicitor General of the State
of New York

ALAN W. RUBENSTEIN
Principal Attorney,
State of New York
of Counsel

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
AUG 27 1974
MICHAEL RODAK, JR., CLERK

No. 73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,
Appellant,

vs.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,

Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,

Appellee.

On appeal from the United States District Court for the Northern District of New York

Brief of the State of California as Amicus Curiae in support of Appellant

EVELLE J. YOUNGER,
Attorney General of the State of California
ELIZABETH PALMER
Assistant Attorney General
JOHN J. KLEE, JR.
Deputy Attorney General
6000 State Building
San Francisco, California 94102
Telephone: (415) 557-3611
Attorneys for Amicus Curiae State of California

BORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1095

ABE LAVINE, individually and as Commissioner of the Department of Social Services of the State of New York,
Appellant,

vs.

SYLVIA SHIRLEY, individually and on behalf of her minor dependent children, TAMMY LYNN and LISA MARIE, and on behalf of all others similarly situated;

ELIZABETH ANDERSON, individually and on behalf of her minor dependent child, JOANNE, and on behalf of all others similarly situated;

JANE DOE, individually and on behalf of her minor dependent child, KIRSTEN WYNN, and on behalf of all others similarly situated,
Appellees,

and

JOHN LASCARIS, individually and as Commissioner of the Department of Social Services of the County of Onondaga,
Appellee.

Brief of the State of California as Amicus Curiae in support of Appellant

INTRODUCTION

This brief is submitted by the State of California, sponsored by its Attorney General, as *amicus curiae* in support of appellant. The brief is submitted in support of the proposition that there is nothing in the Social Security Act which

prohibits a State from requiring, as a condition of eligibility for Aid to Families With Dependent Children (AFDC), that the applicant reveal information regarding the identity and whereabouts of the alleged "absent parent" and cooperate with the State in its effort to establish paternity and collect support from such "absent parent".

We have read the Brief for Appellant Lavine as well as the brief submitted by *amicus curiae* Pacific Legal Foundation. We believe that those briefs contain a careful and correct analysis of the relevant statutes and cases. It is not the purpose of this brief to simply reiterate those arguments. Rather, the purpose of this brief is to demonstrate how the decision in the present case and those like it have operated so as to frustrate express provisions of the Social Security Act.

ARGUMENT

There Is Nothing in the Social Security Act Which Purports to Prevent a State from Requiring an Applicant for AFDC to Give Information Regarding the Alleged "Absent Parent". In Fact, Proper Administration of the Program Requires Such Information.

The effect on a State's AFDC program of the acceptance of the position of appellee can be vividly demonstrated by examining the current situation in California.

California, like New York, has enacted as part of its AFDC program a requirement that, as a condition of eligibility, the applicant must, if she has such knowledge, give the welfare department information regarding the identity and whereabouts of the "absent parent". The statute also requires the applicant to cooperate with the district attorney in his attempt to seek support for the dependent child from such "absent parent". Welfare and Institutions Code, section 11477.

In 1969, an action was commenced in federal district court challenging that statutory provision to the extent it required the applicant to sign a criminal complaint for non-support against the "absent parent". The court entered a preliminary injunction against enforcement of that portion of the statute. *Taylor v. Martin*, 330 F.Supp. 85 (N.D. Cal. 1971), aff'd sub nom. *Carleson v. Taylor*, 404 U.S. 980 (1971). Thereafter, another action, entitled *Doe v. Carleson* (N.D. Cal. No. 71-864 RFP), was filed attacking the remaining portions of the statute. In July 1972, the following order was entered in that case:

> "Defendant ROBERT CARLSON, Director of the State Department of Social Welfare, his agents, employees and all persons acting in concert or participating with him are hereby enjoined and restrained from invoking California Welfare and Institutions Code §§ 11477(a), 11477(c) or 11477(d) or any state statute or regulation, which results in the ineligibility for AFDC of any person because the applicant refuses to be interviewed by the district attorney, refuses to disclose the identity or whereabouts of an absent parent of her or his children, or requests dismissal of a criminal non-support complaint previously filed against an absent parent of her or his children."

Then, in March 1973, the court entered the following order in the consolidated cases:

> "Defendants, their officers, agents, servants, employees, and attorneys, and all those persons in active concert or participation with them who receive actual notice of this order are hereby ordered as supplemental relief to this Court's orders in *Taylor* and *Doe* not to instruct, or advise members of the plaintiff's class contrary to law that benefits may be terminated for failure to comply with the requirements of Cal. Wel. and Inst. Code § 11477. *It is further ordered that*

defendant Carlson implement procedures within thirty days from the date of this order to affirmatively insure that recipients are informed that their cooperation or lack thereof within the meaning of Cal. Wel. and Inst. Code § 11477 will not affect their eligibility." (Emphasis added.)

Thus, as a result of these orders, California is not only prohibited from enforcing the statute, it must affirmatively tell applicants that it is not necessary to cooperate with the State in its effort to seek support from the "absent parent".

Despite these orders, the Director of the Department of Benefit Payments (then known as the Department of Social Welfare) determined that it was necessary to obtain certain basic information in order to determine eligibility. Accordingly, he informed the counties that they should require the applicant for AFDC to give the name, last known address and Social Security number of the "absent parent". In October 1973 the District Court entered an order holding the Director in contempt of the July 1972 order on the grounds that requiring even this basic information was not authorized by the Social Security Act.

Thus, as it now stands in California, the local welfare department cannot even require an applicant for AFDC to give the name of the "absent parent". This means, for example, that if a woman claims that the man with whom she has been living for the last three years is not the father of her one-year old child, the welfare department cannot require her to tell who the father is so that they can determine whether there really is an "absent parent".

The effect of the nullification of the statute, coupled with the requirement that the counties must affirmatively tell applicants that they need not cooperate or furnish information regarding the "absent parent", has been staggering.

The California Department of Benefit Payments recently requested the counties to supply the Department with statistics regarding the number of applicants who have in fact refused to cooperate during the last quarter of 1973 and the first quarter of 1974. While the reports from all the counties are not the same, it is obvious that refusals to cooperate are more than just isolated examples. In Fresno County, there were 347 refusals, which represented 58 percent of all new cases. Likewise, Kings County: 31 refusals, representing 63 percent; Orange County: 838 refusals, representing 36 percent; San Mateo County: 244 refusals, representing 75 percent; Santa Cruz County: 45 refusals, representing 33 percent; Sonoma County: 55 refusals, representing 42 percent; Stanislaus County: 126 refusals, representing 33 percent; Yuba County: 71 refusals, representing 45 percent. There can be no question but that these refusals to cooperate or even furnish basic facts regarding the identity and whereabouts of the "absent parent" seriously hamper the State's ability to effectively administer the AFDC program and carry out programs specifically mandated by Congress. Judicial decisions requiring these results are not based on valid grounds and should be overruled or reversed.

The theory underlying the lower court decisions invalidating statutes such as New York's and California's is that such statutes add an eligibility requirement for AFDC and that the Social Security Act prohibits the addition of any eligibility requirement not specifically set forth in the Act. That basic premise is erroneous. In *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973), this Court reaffirmed the principle stated in *King v. Smith*, 392 U.S. 309 (1968) that the AFDC program was a "scheme of cooperative federalism" and that "this Court should not

lightly interfere" with attempts by the States to operate their programs in a manner not inconsistent with the basic objectives established in the Act. 413 U.S., at 413. In *Dublino*, this Court held that the New York Work Rules, which indeed added an eligibility requirement, were not to be held invalid unless it was concluded that "particular sections" of the Work Rules "contravene the specific provisions of the Federal Social Security Act." 413 U.S., at 422.

It is clear that the Act does not contain any specific statement that States cannot add an eligibility requirement which is designed to further the goals of the AFDC program. The section relied upon by the District Court in California was 42 U.S.C. § 602(a)(10). However, such a construction of section 602 was rejected by this Court in *Jefferson v. Hackney*, 406 U.S. 535, at 544-5 (1972).

CONCLUSION

AFDC program provisions such as those of New York and California which require, as a condition of eligibility, that the applicant reveal the identity and whereabouts, if known, of the "absent parent" and cooperate in the State's attempt to collect support for the dependent child from such "absent parent" fulfill a valid purpose consistent with the AFDC program. They do not contravene any specific provision of the Federal Social Security Act and, accordingly, should be upheld.

Allowing the States to bring an independent non-support action and subpoena the recipient to testify about the "absent parent" is all well and good. But it is not in and of itself a sufficient answer to the problem. States should not have to wait until after the applicant is placed on aid. States should be allowed to deal with the problem at the threshold and require cooperation at the initial stages

where, as a realistic and practical matter, it will be most effective and productive.

The judgment of the District Court should be reversed.

Respectfully submitted,

EVELLE J. YOUNGER,
Attorney General of the State of California

ELIZABETH PALMER
Assistant Attorney General

JOHN J. KLEE, JR.
Deputy Attorney General

Attorneys for Amicus Curiae State of California

Dated August 26, 1974

MOTION FILED
JUL 25 1974

In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-1095

ABE LAVINE, *Appellant,*

vs.

SYLVIA SHIRLEY, *Appellee.*

No. 73-1016

JOHN L. LASCARIS, *Appellant,*

vs.

SYLVIA SHIRLEY, *Appellee.*

On Appeal from the United States District Court for the Northern District of New York

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF PACIFIC LEGAL FOUNDATION

RONALD A. ZUMBRUN,
Counsel, Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814,

JOHN H. FINDLEY,
THOMAS E. HOOKANO,
Associate Counsel, Pacific Legal Foundation,
455 Capitol Mall, Suite 465,
Sacramento, California 95814,

Attorneys for Amicus Curiae Pacific Legal Foundation.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO - CA 94105

Table of Contents

	Page
Motion for Leave to File Brief Amicus Curiae in Support of Appellants on Behalf of Pacific Legal Foundation	1
Brief of Amicus Curiae in Support of Appellants on Behalf of Pacific Legal Foundation	5
Interest of Amicus	5
Opinion Below	6
Argument	6
I. The absent parent syndrome, the basis of eligibility in the vast majority of AFDC cases, creates a critical strain on public funds	6
II. Requiring the cooperation of the deserted mother is a necessary administrative tool designed to implement the specific requirements of the Social Security Act	11
III. Removal of incentives to the AFDC mother to cooperate in identifying and locating the absent father will have particularly serious consequences in paternity determination	18
IV. Striking the proper balance between competing legislative goals is not a judicial function	19
Conclusion	24

Table of Authorities Cited

Cases	Pages
Dandridge v. Williams, 397 U.S. 471 (1970)	2, 23
Jefferson v. Hackney, 406 U.S. 535 (1972)	2, 21, 22
New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973)	2, 9, 10
Shea v. Vialpando, ____ U.S. ____, 40 L.Ed.2d 120 (1974)	14, 20
Shirley v. Lavine, 365 F.Supp. 818 (1973)	6, 11, 20, 21, 23
Townsend v. Swank, 404 U.S. 282	21, 22
Wyman v. James, 400 U.S. 309 (1971)	2, 8, 9, 15, 16, 17

Rules	
Supreme Court Rule 42	1
400 U.S. at 311	15
400 U.S. at 315, 316	15
400 U.S. at 319	15
400 U.S. at 326	15

Statutes	
42 U.S.C. 601	15
42 U.S.C. 602	15
42 U.S.C. 602(a)(7), (8)	12, 22
42 U.S.C. 602(a)(10)	21, 22
42 U.S.C. 602(a)(11)	12, 22
42 U.S.C. 602(a)(17)	12, 22
42 U.S.C. 602(a)(18)	12, 22
42 U.S.C. 602(a)(19)	11

Pages

42 U.S.C. 602(a)(21) 12, 22

42 U.S.C. 602(a)(22) 13, 22

42 U.S.C. 606 11

42 U.S.C. 606(a) 6, 11

42 U.S.C. 606(a)(2)(B) 22

New York Social Services Law, Section 101-a 8, 11, 24

Government Publications

Final Report of the Task Force on Absent Parent Child Support, California State Social Welfare Board, January, 1971 7

Social Statistics: A Monthly Summary, New York State Department of Social Services, Volume XXVI, Number 2, February, 1974, issued June 20, 1974..... 8

Unplanned Parenthood, California State Social Welfare Board, April, 1974 ..... 18, 19

1973 Annual Report of the New York State Department of Social Services, April, 1974 ..... 13, 20

Law Review Article

Zumbrun, Momboisse and Findley, Welfare Reform: California Meets the Challenge, 4 Pac.L.J. 739 (1973)..... 6

In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-1095

ABE LAVINE, *Appellant,*

vs.

SYLVIA SHIRLEY, *Appellee.*

No. 73-1016

JOHN L. LASCARIS, *Appellant,*

vs.

SYLVIA SHIRLEY, *Appellee.*

On Appeal from the United States District Court for the Northern District of New York

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF PACIFIC LEGAL FOUNDATION

This motion of the Pacific Legal Foundation for leave to file the annexed brief *amicus curiae* is respectfully made pursuant to Rule 42, consent to the

filing of a brief having been granted by counsel for Appellant Lascaris but withheld by counsel for Appellee Shirley and Appellant Lavine.

Pacific Legal Foundation is a nonprofit corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for the Pacific Legal Foundation is set by a Board of Trustees composed of concerned citizens. Ten of the eighteen-member Board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

The Pacific Legal Foundation is gravely concerned by the action of the court below in overturning a state welfare statute on a rationale which ignores the controlling precedents established by this Court in *Wyman v. James*, 400 U.S. 309 (1971); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *New York State Department of Social Services v. Dublino*, 413 U.S. 405 (1973); and *Dandridge v. Williams*, 397 U.S. 471 (1970), among others.

Pacific Legal Foundation considers that this case is of special significance in that it raises fundamental questions concerning the ability of all states to protect public assistance funds. Procedures requiring welfare recipients to furnish information necessary to verify the deprivation and establish the amount of income and resources upon which eligibility depends are in effect in every state; unless the District Court

decision is reversed, the ability of public officials to ensure that assistance is granted only to the needy will be effectively hamstrung.

Pacific Legal Foundation believes that the magnitude of this issue was not fully developed in the District Court and doubts that the parties will address the scope of the absent parent issue before this Court.

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed brief *amicus curiae* be granted.

Respectfully submitted,

RONALD A. ZUMBRUN,
Counsel, Pacific Legal Foundation.
JOHN H. FINDLEY,
THOMAS E. HOOKANO,
Associate Counsel, Pacific Legal Foundation.
Attorneys for Amicus Curiae
Pacific Legal Foundation.

July, 1974

In the Supreme Court
OF THE
United States

OCTOBER TERM 1973

No. 73-1095

ABE LAVINE, *Appellant,*

VS.

SYLVIA SHIRLEY, *Appellee.*

No. 73-1016

JOHN L. LASCARIS, *Appellant,*

VS.

SYLVIA SHIRLEY, *Appellee.*

On Appeal from the United States District Court for the Northern District of New York

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS ON BEHALF OF PACIFIC LEGAL FOUNDATION

INTEREST OF AMICUS

The interest of *Amicus* is set out in the preceding motion for leave to file this brief.

OPINION BELOW

The three-judge court, United States District Court for the Northern District of New York, in an opinion reported at 365 F.Supp 818 (1973), declared Section 101-a of the New York Social Services Law to be void, unenforceable, and without effect insofar as it makes recipient cooperation concerning establishing paternity or obtaining support a condition of eligibility for Aid to Families with Dependent Children (AFDC).

ARGUMENT

I

THE ABSENT PARENT SYNDROME, THE BASIS OF ELIGIBILITY IN THE VAST MAJORITY OF AFDC CASES, CREATES A CRITICAL STRAIN ON PUBLIC FUNDS

One of the most basic tenets of our society is family responsibility. The fundamental principle that the family is the basic unit in society and has the primary responsibility for the support and care of its own members is no less valid when viewed in the welfare context.[1] A major eligibility requirement for the Aid to Families with Dependent Children-Family Group (AFDC-FG) program is that the family unit must be deprived of at least one parent. (42 USC 606(a).) Deprivation usually results from the absence of the father from the family group.

---

[1]See Zumbrun, Momboisse and Findley, "Welfare Reform: California Meets the Challenge," 4 Pac.L.J. 739, 769-774, a copy of which has been lodged with the Clerk of the Court.

The California State Social Welfare Board in its Final Report of the Task Force on Absent Parent Child Support (January 1971)[2] found that although a small percentage of absent fathers of California's AFDC children were dead or incapacitated, about 85 percent were absent because of divorce, separation, desertion, imprisonment, or because they were never married to the mother of the AFDC child.[3] During fiscal year 1969-1970, only about 15 percent of California's absent fathers contributed to the support of their AFDC children, yet that small percentage contributed a total of $36,500,000, most of which was used to offset welfare grants with resultant savings in county, state, and federal tax dollars.[4] The Task Force further found that of the absent parents on whom statistics were available, a sizeable majority were employed and had an income sufficient to provide at least some child support.[5]

One of the major reasons for the low contribution rate is the difficulty in locating absent parents. This difficulty has been exacerbated by judicial rulings, such as that in the court below, striking down attempts by states to establish programs to identify and locate absent parents through information provided by the AFDC mother.

---

[2]A copy of this report has been lodged with the Clerk of the Court.

[3]Task Force Report, 8.

[4]Task Force Report, 12.

[5]Task Force Report, Appendix 3e.

Statutes such as Section 101-a of the New York Social Services Law represent an attempt by the states to reduce the staggering costs of welfare[6] through establishment of procedures designed to identify, locate, and secure support payments from the absent parents. In this effort, the use of grant termination as a sanction to encourage cooperation on the part of AFDC mothers is necessary to the purpose of protecting public funds.

This Court stated in *Wyman v. James*, 400 U.S. 309 (1971), and discussed more extensively hereafter:

> "The agency, with tax funds provided from federal as well as from state sources, is fulfilling a public trust. The State, working through its qualified welfare agency, has appropriate and paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses. Surely it is not

---

[6]Statistics released in June, 1974, by the New York State Department of Social Services setting forth public assistance (PA) expenditures for the month of February, 1974, indicate that of the total $133.2 million expended, $116.8 million was for the Aid to Dependent Children (ADC) program. This figure does not include administrative costs, food stamp benefits, cost of services and medical assistance. Medical assistance expenditures alone for February 1974 totaled $149.4 million. Although there is apparently no description of medical assistance expenditures by program, if the percentage of public assistance expenditures for ADC can be correlated to expenditures for medical assistance, it would be concluded that 88 percent of the medical assistance expenditure of $131.5 million was allocated to the ADC program. ("Social Statistics: A Monthly Summary", New York State Department of Social Services, Volume XXVI, Number 2, February, 1974, issued June 20, 1974. A copy of this report has been lodged with the Clerk of the Court.)

> unreasonable, in the Fourth Amendment sense or in any other sense of that term, that the State have at its command a gentle means, of limited extent and of practical and considerate application, of achieving that assurance.
>
> "One who dispenses purely private charity naturally has an interest in and expects to know how his charitable funds are utilized and put to work. The public, when it is the provider, rightly expects the same. It might well expect more, because of the trust aspect of public funds, and the recipient, as well as the caseworker, has not only an interest but an obligation." 400 U.S. 309, 318-319.

Attempts by the legislative branch to limit improper or unnecessary expenditure of public funds should not be lightly swept aside by the courts. As this Court declared in *New York State Department of Social Services, et al. v. Dublino,* 413 U.S. 405, 37 L.Ed.2d 688, 694 (1973), reversing the lower court's overturning of the New York Work Rules:

> "This is a sweeping step that strikes at the core of state prerogative under the AFDC program—a program which this Court has been careful to describe as a 'scheme of cooperative federalism.' [Citations omitted.] It could impair the capacity of the state government to deal effectively with the critical problem of mounting welfare costs and the increasing financial dependency of many of its citizens. . . . "

Even more so than in *Dublino,* the striking down of the cooperation requirement here will greatly impair

the ability of states to deal with the mounting costs of absent parenthood and concomitant limitation on availability of funds for families driven to financial dependency by this desertion.

This Court wisely observed in *Dublino:*

> " . . . To the extent the Work Rules embody New York's attempt to promote self-reliance and civic responsibility, to assure that limited state welfare funds be spent on behalf of those genuinely incapacitated and most in need, and to cope with the fiscal hardships enveloping many state and local governments, this Court should not lightly interfere. The problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution." 413 U.S. ——, 37 L.Ed.2d 688, 694-695.

If an AFDC family's sense of self-reliance and civic responsibility may be held to require cooperation with the Work Rules, logic dictates that it also requires cooperation in securing support from absent parents. Nothing could do more to alleviate fiscal hardships and provide greater resources for those truly in need than the procurement from absent parents of the support owed to their deserted families.

II

REQUIRING THE COOPERATION OF THE DESERTED MOTHER IS A NECESSARY ADMINISTRATIVE TOOL DESIGNED TO IMPLEMENT THE SPECIFIC REQUIREMENTS OF THE SOCIAL SECURITY ACT

In striking down Section 101-a of the New York Social Services Law, the District Court commented:

> "While we are not outraged by nor unsympathetic to New York's effort to compel Anna Stuck to cooperate in a proceeding to compel support for her youngest child to the extent required by §101-a, we find no authority for engrafting such a condition on to the Congressionally prescribed initial AFDC eligibility requirements or on to the grounds for discontinuance of benefits." 365 F.Supp. 821.

The District Court thus incorrectly presupposed that Congress has delineated a set of specific eligibility requirements for Aid to Families with Dependent Children. With limited exceptions, such as registration for manpower services, training and employment,[6a] the Social Security Act provides only a single broad guideline for AFDC eligibility—dependency, resulting from a combination of deprivation and need.[7]

Congress has put the primary burden of determining dependency upon the states, each of which must submit a State Plan meeting the requirements of 42 USC 602(a).

[6a] 42 USC 602(a)(19).

[7] 42 USC 606.

As a function of determining need, the state is required to take into consideration the income and resources of any child or custodial relative claiming AFDC eligibility.[8] One of the major sources of potential income and resources is the absent parent. Yet unless this source is identified and located, it will merge with the 85 percent of absent parents who contribute nothing to the support of their AFDC children. Frequently, only the mother of the AFDC children can provide the information—name, address, social security number, vehicle registration number or name of employer—which will locate the absent parent.

As a function of determining deprivation, the states must determine the fact of the absence of the parent, provide prompt notice to appropriate law enforcement authorities of the desertion;[9] establish paternity in the case of a child born out of wedlock, secure support from the absent parent;[10] enter into cooperative arrangements with appropriate courts and law enforcement officials to assist in securing such support;[11] provide quarterly reports to the supervising federal agency of the name, address, social security number and other information of nonsupporting parents;[12] and cooperate in locating and securing sup-

---

[8] 42 USC 602(a)(7), (8).
[9] 42 USC 602(a)(11).
[10] 42 USC 602(a)(17).
[11] 42 USC 602(a)(18).
[12] 42 USC 602(a)(21).

port from absent parents from other states within the state's jurisdiction.[13]

It is true that the Social Security Act does not specify that a recipient must as a condition of eligibility cooperate in providing information which will assist the state in establishing paternity or securing support from an absent parent. It is important to note, however, that the Act does not specify that a recipient must, as a condition of eligibility, cooperate in providing information which will establish income or resources. Nevertheless, it has never been seriously argued that the state may not require the recipient to provide such information as a condition of eligibility —except where the information sought relates to an absent parent.

There is no logical reason for this exception in that information on the identity and location of absent parents is necessary to determine both facets of dependency. Absence of the father is the basis of the recipient's deprivation in approximately 80 percent of all New York AFDC cases.[14] In order for this deprivation to exist, the father must in fact be absent from the home. Yet state audits in 1973 determined that in 42.8 percent of AFDC cases found to be ineligible, the ineligibility was due to an unreported father in the home who was capable of providing support.[15]

---

[13]42 USC 602(a)(22).

[14]1973 Annual Report of the New York State Department of Social Services, Publication No. 1016 (4/74) part III, 8.

[15]1973 New York Annual Report, part II, 2 and part III, 8.

Because the mother is frequently the only source of information concerning the identity and location of the absent parent, the effect of the District Court decision will be to compound this already serious problem and greatly increase the rate of ineligibility error. Putting it bluntly, the decision is an invitation to commit fraud. In this context, it may be asked why an AFDC mother would refuse to identify and assist in locating the absent father. The answer suggests itself in the above statistic that 42.8 percent of New York's AFDC case ineligibility results from the presence of an unreported father in the home who was capable of providing support and presumably was using the AFDC grant as an illegal windfall.

The Social Security Act imposes a set of comprehensive requirements upon the states to ensure that only eligible persons receive AFDC and to further ensure that those persons having the primary legal obligation to support dependent children are required to fulfill that obligation. As this Court noted in *Shea v. Vialpando*, ... U.S. ....., 40 L.Ed.2d 120, 129 (1974):

> "From the inception of the Act, Congress has sought to ensure that AFDC assistance is provided only to needy families, and that the amount of assistance actually paid is based on the amount needed in the *individual* case after other income and resources are considered."

In the absent parent context, these requirements are all too frequently frustrated because the state is

unable to take the first step—identifying the absent parent. This information is peculiarly within the knowledge of the AFDC mother and cooperation of the mother is a prerequisite for the states to carry out their federally-mandated functions.

In *Wyman v. James,* 400 U.S. 309 (1971), this Court was presented with the issue whether an AFDC recipient could refuse a home visit by the case worker without risking the termination of all AFDC benefits. As was noted by the Court, the home visit was not required by federal statute or regulation[16] but was imposed by state law.[17] Nonetheless, the Court concluded that taking into consideration the requirements imposed upon the states by the Social Security Act — to maintain and strengthen family life[18], to provide such reports as the Secretary of Health, Education and Welfare may require, to take into consideration any other income and resources of any child or relative claiming aid and to bring conditions of neglect, abuse or exploitation of an AFDC child to the attention of the appropriate court or law enforcement agencies[19]—authorized the state requirement of home visits as a "reasonable administrative tool" which "serves a valid and proper administrative purpose for the dispensation of the AFDC program. . . ." 400 U.S. at 326.

---

[16]400 U.S. at 319.
[17]400 U.S. at 311.
[18]42 USC 601.
[19]42 USC 602; 400 U.S. at 315, 316.

In a perceptive comment, this Court noted:

> " . . . What Mrs. James appears to want from the agency that provides her and her infant son with the necessities for life is the right to receive those necessities upon her own informational terms, . . . and to avoid questions of any kind.
>
> "We are not persuaded, as Mrs. James would have us be, that all information pertinent to the issue of eligibility can be obtained by the agency through an interview at a place other than the home, or, as the District Court majority suggested, by examining a lease or a birth certificate, or by periodic medical examinations, or by interviews with school personnel. [Citation omitted.] Although these secondary sources might be helpful, they would not always assure verification of actual residence or of actual physical presence in the home, which are requisites for AFDC benefits, or of impending medical needs." [Footnote omitted] *Wyman v. James,* 400 U.S. at 321-322.

The Court in *James* analogized the situation of the noncooperative AFDC recipient to that of a taxpayer whose income tax return was being audited by the Internal Revenue Service and who has been asked to furnish proof of a beneficial deduction:

> "If the taxpayer refuses, there is, absent fraud, only a disallowance of the claimed deduction and a consequent additional tax. The taxpayer is fully within his 'rights' in refusing to produce the proof, but in maintaining and asserting those rights a tax detriment results and it is a detri-

> ment of the taxpayer's own making. So here Mrs. James has the 'right' to refuse the home visit, but a consequence in the form of cessation of aid, similar to the taxpayer's resultant additional tax, flows from that refusal. The choice is entirely hers, and nothing of constitutional magnitude is involved." 400 U.S. at 324.

The requirement to cooperate in a home visit in *James* is analogous to the requirement to cooperate in identifying and locating absent parents. While these requirements are not stated as such in the Social Security Act, each is in the words of this Court, "a reasonable administrative tool" needed by the state to determine information upon which eligibility for aid may be established. Like the plaintiff in *James*, the plaintiff below has not been forced to cooperate.

> "Her wishes in that respect are fully honored. . . . The only consequence of her refusal is that the payment of benefits ceases. Important and serious as this is, the situation is no different than if she had exercised a similar negative choice initially and refrained from applying for AFDC benefits." *Wyman v. James*, 400 U.S. at 325.

If the plaintiff below has something she wishes to hide, she may do so. But she may not conceal information needed by the state to fulfill its duties under the Social Security Act and expect to maintain eligibility for benefits. The recipient must bear at least a part of the responsibility to ensure that welfare benefits are paid only to those entitled to receive them

and that the deserting father pay his fair share of his family's support.

III

REMOVAL OF INCENTIVES TO THE AFDC MOTHER TO COOPERATE IN IDENTIFYING AND LOCATING THE ABSENT FATHER WILL HAVE PARTICULARLY SERIOUS CONSEQUENCES IN PATERNITY DETERMINATION

The cooperation of the AFDC mother in identifying and locating the father is the single most valuable factor in a situation of marital disassociation. Such cooperation becomes absolutely indispensable in the situation where marriage never existed. In such cases, the mother is the only person who can furnish the identity of the father of the AFDC child and the state has no recourse other than to require her cooperation.

A study made by the California State Social Welfare Board,[20] established the extent of the problem of illegitimate children on AFDC. The study notes that in 1973, California had 161,507 families with illegitimate children receiving AFDC, comprising 43 percent of the caseload.[21] In January of 1973, California had an AFDC caseload of 991,274 children of which 244,117 or 24.6 percent were illegitimate.[22] Taking into account cash grants, medical care, food stamps, social

---

[20] *Unplanned Parenthood*, (April, 1974), a copy of which has been lodged with the Clerk of the Court.

[21] *Unplanned Parenthood*, 26.

[22] *Unplanned Parenthood*, 27.

services and administrative expenses, the California State Social Welfare Board estimated the cost of supporting and caring for the nearly one-quarter million illegitimate children on AFDC in California in 1973 was $474,305,000.[23] This near half billion dollar amount must be taken from the pockets of county, state and federal taxpayers because of the failure of unwed fathers to provide support for their children. The net effect is to reduce the amount of welfare funds available to all recipients.

Judicial rulings such as that of the District Court in the instant case stress the importance of individual rights and freedoms. Unfortunately, they ignore the responsibilities correlative to these rights. Just as it is the obligation of the unwed father to bear the cost of support of his children to the best of his economic ability, it is the responsibility of the AFDC mother to identify and assist in location of the father so that this obligation may be imposed.

IV

STRIKING THE PROPER BALANCE BETWEEN COMPETING LEGISLATIVE GOALS IS NOT A JUDICIAL FUNCTION

The District Court noted that the case at bar involves two distinct goals of the AFDC program when a family is deserted by a parent who fails to fulfill his obligation of support. One of the goals of AFDC is to provide assistance to the deserted family. An equally desirable goal is to enforce the legal obligation

[23] *Unplanned Parenthood*, 27-28.

of the absent parent to support his child. "While distinct, these goals are not necessarily competing. They become so only when one is pursued as [sic] the expense of the other." *Shirley v. Lavine,* 365 F.Supp. 818, 821.

In passing, it should be noted that the District Court's analysis overlooks the fundamental requirement that desertion must in fact occur before these families become eligible for AFDC and the first enumerated goal becomes applicable. The 1973 Annual Report of the New York State Department of Social Services found that the largest single type of eligibility error identified was the granting of public assistance based on the claim that the father was absent from the home when in fact he was not. As previously noted, erroneous claims of an absent parent accounted for 42.8 percent of all AFDC cases found to be ineligible.[24] Perhaps the District Court should have included a third goal—ensuring that only eligible persons receive assistance. *Shea v. Vialpando,* ..... U.S. ....., 40 L.Ed.2d 120, 129 (1974).

Nonetheless, while chiding the State of New York for allegedly pursuing the goal of obtaining support from absent parents at the expense of the goal of providing assistance to families alleging desertion, the District Court decided that the State should pursue the goal of providing assistance at the expense of the goal of obtaining support and implicitly at the expense of the goal of providing assistance only to

---

[24]New York 1973 Report, Part II, 2.

eligible families. In so deciding, the District Court ignores the rule espoused by this Court in *Jefferson v. Hackney,* 406 U.S. 535 (1972), that:

> "Striking the proper balance between these competing policy considerations is, of course, not the function of this Court. . . . So long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act, appellants' policy arguments must be addressed to a different forum." 406 U.S. 535, 541.

The District Court's reliance (365 F.Supp. 824) on Section 402(a) (10) of the Social Security Act (42 USC 602(a) (10)) and on *Townsend v. Swank,* 404 U.S. 282, was clearly misplaced. This section, which provides that AFDC benefits must "be furnished with reasonable promptness to all eligible individuals," was interpreted in *Jefferson,* 406 U.S. 535, 544-545, with particular care given to limitation of the scope of *Townsend:*

> "That section was enacted at a time when persons whom the State had determined to be eligible for the payment of benefits were placed on waiting lists, because of the shortage of state funds. The statute was intended to prevent the States from denying benefits, even temporarily, to a person who has been found fully qualified for aid. [Citation omitted.] Section 402(a) (10) also forbids a State from creating certain exceptions to standards specifically enunciated in the federal act. See, e.g., *Townsend v. Swank,* 404 U.S. 282 (1971). It does not, however, enact by implication a generalized federal criterion to which States must adhere in their computation of

> need, income, and benefits. [Footnote omitted.] Such an interpretation would be an intrusion into an area in which Congress has given the States broad discretion, and we cannot accept appellant's invitation to change this longstanding statutory scheme simply for policy reasons of which we are not the arbiter."

This Court in *Jefferson* read Section 402(a) (10) as barring states from creating certain exceptions to *specific* standards in the Act. In *Townsend, supra,* the issue was an Illinois statute which denied AFDC eligibility to children aged 18 through 20 who were in college. This was in direct conflict with Section 406(a) (2) (B) of the Act which specified eligibility for a child under age 21 who was a "student regularly attending a school, college, or university." In the case at hand, however, there is no provision in the Act which similarly specifies eligibility for a mother who refuses to provide information as to the identity and location of the absent parent or otherwise refuses to cooperate in obtaining support for his children.

Rather than dealing with specific eligibility standards and creating exceptions thereto, as was the case in *Townsend,* New York is attempting to carry through its general mandate to determine dependency through verifying deprivation and resources. New York's statute does not contravene the Federal Act, but rather serves as the only feasible means of complying with the requirements imposed on the state by Sections 402(a) (7), (11), (17), (18), (21), and (22) of the Act.

In a decision reversing the lower court's voiding of the Maryland method of limiting the amount of AFDC grants to large families, this Court declared:

> "We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration, Goldberg v. Kelly, 397 US 254, 25 LE2d 287, 90 S Ct 1011. But the Constitution does not empower this Court to second guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients. [Citations omitted.]" *Dandridge v. Williams,* 397 U.S. 471, 487 (1970).

This case does not raise the issue of procedural safeguards. The record is clear that the *Goldberg* requirements were provided and used. 365 F.Supp. 818. The sole issue is whether state officials can protect the distribution of public welfare funds by weeding out the nonneedy and the needy-by-choice obstructionists from the myriad of potential recipients.

CONCLUSION

The enforcement of child support is one of the few areas of preventive welfare. The State of New York, through the enactment and enforcement of Section 101-a, is carrying out its federally-mandated duty to conserve the limited amount of welfare funds by attempting to identify and locate the absent father for the dual purpose of verifying his absence from the AFDC home and ensuring that he fulfill his support responsibility to the best of his economic capability. The New York statute, in requiring the cooperation of the mother in this identification and location procedure, is merely requiring her to assist in the determination and verification of her own eligibility and to make available a larger pool of welfare funds for all those truly in need. Pacific Legal Foundation, as *amicus curiae,* therefore urges that the decision of the District Court be reversed.

Respectfully submitted,

RONALD A. ZUMBRUN,
Counsel, Pacific Legal Foundation,
JOHN H. FINDLEY,
THOMAS E. HOOKANO,
Associate Counsel, Pacific Legal Foundation,
Attorneys for Amicus Curiae
Pacific Legal Foundation.

July, 1974.

see 73 - 1016